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DEAD INNOCENT: THE DEATH PENALTY ABOLITIONIST SEARCH FOR A WRONGFUL EXECUTION

Jeffrey L. Kirchmeier*

All systems of law, however wise, are administered through men, and therefore may occasionally disclose the frailties of men. Perfection may not be demanded of law, but the capacity to correct errors of inevitable frailty is the mark of a civilized legal mechanism.

—Justice Felix Frankfurter¹

[T]hose ideologically driven to ferret out and proclaim a mistaken modern execution have not a single verifiable case to point to, whereas it is easy as pie to identify plainly guilty murderers who have been set free.

—Justice Antonin Scalia²

I. INTRODUCTION

In 1935, a writer in *The New Yorker* discounted the risk of wrongful executions, noting, “The vision of American criminal law as a ravening monster, forever hounding innocent people into the electric chair, is one with which emotional persons like to chill their blood. It is a substitute for tales of ghosts and goblins.”³ However, since 1976,⁴ there have been more than one hundred people released from death row who were

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1. Felix Frankfurter, *The Case of Sacco and Vanzetti: A Critical Analysis for Lawyers and Laymen* 108 (Universal Lib. ed., Little, Brown & Co. 1962).

2. *Kan. v. Marsh*, 126 S. Ct. 2516, 2539 (2006).

3. Edmund Pearson, *A Reporter at Large: Hauptmann and Circumstantial Evidence*, *The New Yorker* 41 (Mar. 9, 1935).

4. The modern era of the death penalty is defined by the decisions of the United States Supreme Court that include *Furman v. Georgia*, 408 U.S. 238 (1972), which invalidated previous capital sentencing procedures, and *Gregg v. Georgia*, 428 U.S. 153 (1976), which upheld the constitutionality of the foundation for current capital sentencing procedures. Prior to 1976 and the modern era of the death penalty, there were approximately an additional 14,489 legal executions. See Death Penalty Info. Ctr., *Executions in the United States, 1608–1976*, *By State*, <http://www.deathpenaltyinfo.org/article.php?scid=8&did=1110> (accessed Sept. 21, 2006); see also M. Watt Espy & John Ortiz Smykla, *Executions in the United States, 1608–2002: The ESPY File*, ICPSR Study No. 8451 (4th ed., ICPSR 2004) (available at <http://webapp.icpsr.umich.edu/cocoon/NACJD-STUDY/08451.xml> (accessed Sept. 21, 2006)).

innocent of murder.⁵ Prior to this time period, there are likely instances of wrongful executions.⁶ Yet, there is no conclusive proof that any one of the more than one thousand inmates executed in modern times was innocent.⁷

Even the strongest advocates of the death penalty do not wish to execute the innocent, and those opposed to the death penalty, of course, do not want anyone executed. However, an interesting twist occurs when you talk about the past because death penalty opponents have the somewhat ghoulish hope to prove that someone already executed was in fact innocent.⁸ The purpose of the abolitionist's quest is not a wish for the suffering of the innocent but to establish a deathblow to capital punishment.⁹

Similarly, in addition to the abolitionists, there are those who are not opposed to the death penalty but who believe the death penalty system is unfair and who seek a moratorium on executions until the system can be fixed.¹⁰ For many in the Death Penalty Moratorium Movement, the innocence cases are important illustrations that the current system does not work and needs repair. Those in the Moratorium Movement may look to history for a number of examples of criminal procedure reform that developed out of the fear of wrongful executions.¹¹ For those who believe the system is

5. As of July 2006, the Death Penalty Information Center concluded that "123 death row inmates nationwide have been exonerated by juries or prosecutors since 1973." Robert Schwaneberg, *Panel Takes Up Life-or-Death Debate: Commission Set to Begin Weighing Whether Capital Punishment Should Be Abolished*, Star-Ledger 13, 16 (July 19, 2006).

6. For a discussion of Americans wrongly convicted of capital crimes, some of whom were executed, see generally Michael L. Radelet, Hugo Adam Bedua & Constance E. Putnam, *In Spite of Innocence* (N.E. U. Press 1992). Proponents of the death penalty may argue that the execution of an innocent person prior to 1976 does not indict our current legal system because the capital sentencing procedures changed after *Gregg*, 428 U.S. 153. Thus, they might discount evidence of the execution of innocents prior to the modern era, and that is why there has been so much argument about the Roger Coleman and Larry Griffin cases. However, the idea for death penalty proponents to discount "old" cases is not a new idea. For example, in 1935, a writer in *The New Yorker* argued that it is difficult to argue there had been recent wrongful executions in America or England, and to cite older cases "is as if one should attack modern medicine because of the vile and ridiculous substances administered by his physicians to Charles II." Edmund Pearson, *A Reporter at Large: Do We Execute Innocent People?* *The New Yorker* 32, 32 (June 22, 1935).

7. As of February 1, 2007, there have been 1,061 executions since 1976. *Executions in the United States in 2007*, Death Penalty Info. Ctr., <http://www.deathpenaltyinfo.org/article.php?did=1666> (accessed Feb. 6, 2007). "Not one of the more than 1,000 people executed in the U.S. since the death penalty was allowed to resume in 1976 has been proved innocent." Frank Green, *DNA Tests Prove Coleman's Guilt*, *Richmond Times-Dispatch* A1, A6 (Jan. 13, 2006).

8. E.g. Bruce P. Smith, *The History of Wrongful Execution*, 56 *Hastings L.J.* 1185, 1186-87 (2005). After DNA evidence revealed Roger Coleman's guilt in 2006, one death penalty advocate claimed that the "creepiest" aspect of Coleman's supporters was that they were "'disappointed' he died a guilty man—that they'd rather Virginia had executed a genuinely innocent person." *The Guilty Martyr*, *Weekly Standard* 2, 3 (Jan. 23, 2006). However, John C. Tucker, author of *May God Have Mercy*, a book arguing Coleman's innocence, noted after the DNA test, "I am certainly glad that this was not a case of an innocent man being executed." Thomas Frisbie, *Lawyer Here Glad Retest Was Done*, *Chicago Sun-Times* 40 (Jan. 13, 2006).

9. "To activists opposed to the death penalty, the prospect that persons might be executed for crimes that they did not commit provides what is probably the most compelling argument in favor of abolishing capital punishment." Smith, *supra* n. 8, at 1186-87.

10. Jeffrey L. Kirchmeier, *Another Place beyond Here: The Death Penalty Moratorium Movement in the United States*, 73 *U. Colo. L. Rev.* 1, 21-22. "The modern movement is primarily concerned about certain aspects of the process of imposing the death penalty, not necessarily about the morality of killing convicted murderers." *Id.* at 21. See also ABA House of Delegates, *Death Penalty Moratorium Implementation Project*, <http://www.abanet.org/moratorium/resolution.html> (accessed Sept. 24, 2006) (resolution approved Feb. 3, 1997, stating that jurisdictions should institute a moratorium on the death penalty until addressing the risk that innocent people will be executed).

11. Several procedural rules developed in the nineteenth century in the United States out of concern about

flawed, the discovery of an executed innocent person would instigate changes to the system. Thus, the innocence cases help the agenda of both those who seek to abolish the death penalty as well as those who merely want a moratorium on executions.¹²

When death penalty opponents point to the people exonerated from death row, death penalty proponents respond that none of the exonerated were actually executed.¹³ For example, Justice Scalia recently wrote, “those ideologically driven to ferret out and proclaim a mistaken modern execution have not a single verifiable case to point to.”¹⁴ Thus, death penalty opponents hope that with the proof that an innocent person was executed, an overwhelming majority of Americans will oppose the death penalty.¹⁵

The current concern about the risk of wrongful executions in the United States has grown from discoveries of innocent people on death row.¹⁶ A 2006 article in *U.S. News & World Report* about the dropping number of executions and death sentences noted, “[n]othing has unsettled people more than the parade of prisoner exonerations based on DNA evidence.”¹⁷ The innocence issue has not just affected the general populace. In 2002, a federal district judge found that the Federal Death Penalty Act¹⁸ violated the Due Process Clause because the law risks the execution of innocent persons.¹⁹

In the past too, many of the arguments against the death penalty have rested on concerns about executing the innocent.²⁰ Throughout history, many of the names used

the possibility of wrongful executions. Smith, *supra* n. 8, at 1207–14. Similarly, in the late 1700s in England, concerns about the risk of wrongful executions did not lead to the abolition of capital punishment, but the concerns “provoked prominent English legal commentators to call for strict application of evidentiary safeguards and had encouraged English judges to implement significant evidentiary initiatives designed to reduce the possibility of wrongful conviction and execution.” *Id.* at 1198.

12. There is some overlap between the abolition movement and the moratorium movement, as many people who seek a moratorium are also opposed to the death penalty. Kirchmeier, *supra* n. 10, at 21. Because both would benefit from the discovery of a wrongful execution, for purposes of the rest of this article, I do not further distinguish between the two groups.

13. *Marsh*, 126 S. Ct. at 2533 (Scalia, J., concurring) (stating that “the dissent does not discuss a single case—not one—in which it is clear that a person was executed for a crime he did not commit”).

14. *Id.* at 2539.

15. Justice Scalia noted that if the innocence of a recently executed inmate were discovered, “we would not have to hunt for it; the innocent’s name would be shouted from the rooftops by the abolition lobby.” *Id.* at 2533.

16. E.g. Mark A. Godsey & Thomas Pulley, *The Innocence Revolution and Our “Evolving Standards of Decency” in Death Penalty Jurisprudence*, 29 U. Dayton L. Rev. 265, 268–71 (2004); Kirchmeier, *supra* n. 10, at 39–43; Carol S. Steiker & Jordan M. Steiker, *The Seduction of Innocence: The Attraction and Limitations of the Focus on Innocence in Capital Punishment Law and Advocacy*, 95 J. Crim. L. & Criminology 587, 594–96 (2005).

17. Liz Halloran, *Pulling Back from the Brink*, 140 U.S. News & World Rpt. 36, 36 (May 8, 2006). The Supreme Court recently acknowledged the importance of DNA evidence in capital cases in *House v. Bell*, where the Court held that new evidence that included DNA evidence created sufficient doubt about guilt to justify a new federal court hearing for a Tennessee death row inmate. 126 S. Ct. 2064, 2078–79 (2006); see James S. Liebman, *The Overproduction of Death*, 100 Colum. L. Rev. 2030 (2000); Lawrence C. Marshall, *The Innocence Revolution and the Death Penalty*, 1 Ohio St. J. Crim. L. 573 (2004).

18. 18 U.S.C. §§ 3591–3598 (Supp. 2006).

19. *U.S. v. Quinones*, 196 F. Supp. 2d 416 (S.D.N.Y. 2002). Judge Jed Rakoff considered the evidence of recent exonerations and reasoned that “the inference is unmistakable that numerous innocent people have been executed.” *Id.* at 418. The decision was later reversed. *U.S. v. Quinones*, 205 F. Supp. 2d 256 (S.D.N.Y. 2002) (holding the Federal Death Penalty Act of 1994 is unconstitutional), *rev’d*, 313 F.3d 49 (2d Cir. 2002), *reh’g denied*, 317 F.3d 86 (2d Cir. 2003).

20. See Godsey & Pulley, *supra* n. 16, at 268–72; Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972–1994* 87 (Oxford U. Press 1996) (noting that concerns about executing the innocent have been raised since at least as early as the 1820s).

to argue against the death penalty were people who were arguably wrongfully executed: Sacco and Vanzetti, the Rosenbergs, and, in England, Derek Bentley. The names are used in much the same way that names of those guilty of some of the worst crimes are used to argue for the death penalty, like the names of Ted Bundy and John Wayne Gacy.

During more than a decade, one executed person who many death penalty abolitionists cited was Roger Coleman. Before Coleman was executed on May 20, 1992,²¹ his picture had appeared on the cover of *Time Magazine* with bold letters stating "This Man Might Be Innocent."²² After his execution, people still argued for his innocence, and a post-execution book laid out the argument for Coleman's innocence.²³

Supporters were so certain of Coleman's innocence that they continued to make the case for Coleman long after he was dead.²⁴ Finally, in 2006, they persuaded Virginia Governor Mark Warner to permit new DNA testing.²⁵ The results, however, disappointed Coleman's supporters. The evidence revealed Coleman was guilty, leaving many of those closest to Coleman feeling betrayed by the man they trusted.²⁶ Meanwhile, death penalty advocates were happy to claim validation for the accuracy of the death penalty system.²⁷

Around the same time as Coleman's guilt made the news, another case of potential innocence was gaining attention. Larry Griffin was executed in Missouri on June 21, 1995,²⁸ but a 2005 report for the NAACP Legal Defense and Educational Fund raised new questions about his guilt.²⁹ Curiously, however, Griffin's case has not received anywhere near the attention that Coleman's case received during the last decade.

Although discoveries of living inmates who are innocent yet condemned to death continue to play an important role in the evolving perceptions about the death penalty, this article focuses on the quest for an innocent not among the living but among those killed by the state. This article discusses the quest to show an innocent person was executed and the impact, if any, that the Coleman and Griffin cases have had on the struggle against the use of the death penalty. The article begins with a historical discussion of the role of wrongful executions on the death penalty abolition movement. The article considers high-profile cases and the role the cases played in popular opinion about the death penalty. Section Three of the article examines the Roger Coleman and Larry Griffin cases, as well as a few other recent cases. Because the struggle to prove

21. See John C. Tucker, *May God Have Mercy: A True Story of Crime and Punishment* 315–30 (Dell Publg. 1997).

22. *Id.* at 276–77; *Time Mag.* cover (May 18, 1992) (available at <http://www.time.com/time/covers/0,16641,1101920518,00.html>).

23. Tucker, *supra* n. 21.

24. One of Coleman's strongest advocates, James McCloskey, the executive director of Centurion Ministries, explained that his motive in seeking the DNA testing was not to attack the death penalty. He explained that he was "part of no movement" but, "I believed in Roger Coleman, I made a promise to Roger Coleman, spent our precious resources on him. I wanted the truth to be known." Glenn Frankel, *Burden of Proof*, *Wash. Post Mag.* 8, 24 (May 14, 2006).

25. Frank Green, *DNA Tests Prove Coleman's Guilt*, *Richmond Times-Dispatch* A1 (Jan. 13, 2006).

26. *Id.*

27. See e.g. William Tucker, *Guilty Again!* *The American Spectator* (Jan. 17, 2006) (available at http://www.spectator.org/dsp_article.asp?art_id=9279).

28. *Executions: Death Sentences Cut in Half Since Late 1990s*, *Aberdeen Am. News* 7A (Nov. 25, 2005); Bob Herbert, *Convicted, Executed, Not Guilty*, *N.Y. Times* A25 (July 14, 2005).

29. Samuel R. Gross & Josiah Thompson, *NAACP Legal Defense and Educational Fund Report on Larry Griffin*, <http://www.truthinjustice.org/griffin-report.htm> (accessed Jan. 24, 2007).

that a wrongful execution occurred is an attempt to sway public opinion, Section Four analyzes the cases from history and finds six reasons that some innocence cases may get more attention than other innocence cases. Section Five discusses two problems that death penalty opponents must address as they attempt to prove that a wrongful execution has occurred. Finally, Section Six summarizes the lessons that death penalty opponents should learn from history and concludes that, while the focus on innocence is overrated among some death penalty opponents, if approached correctly it is one of several important issues surrounding the death penalty.

II. HISTORICAL OVERVIEW OF INNOCENCE AND WRONGFUL EXECUTIONS

A. *A Short History of Innocence as an Issue in the Capital Punishment Debate*

Concerns about executing the innocent probably existed since human beings first began legal executions as punishment.³⁰ Executing the innocent violates the principle of retribution, which is one of the moral foundations of all punishment.³¹ Executing an innocent person punishes someone who does not deserve punishment while, at the same time, allowing the offender who deserves punishment to go free.³²

Furthermore, the irreversible execution of an innocent person raises constitutional issues and undermines our justice system and our sense of fairness.³³ Inherent in our legal system is the principle that we must protect the innocent from punishment.³⁴ Our system requires defendants be convicted by the high standard “beyond a reasonable doubt.”³⁵ If, as Justice Harlan noted, it is “a fundamental value determination of our

30. James S. Liebman & Lawrence C. Marshall, *Less Is Better: Justice Stevens and the Narrowed Death Penalty*, 74 Fordham L. Rev. 1607, 1650–51 (2006) (stating “[s]ince time immemorial, opponents of the death penalty have pointed to the risk of wrongful convictions as reason enough to abolish capital punishment” (footnote omitted)); Smith, *supra* n. 8, at 1190–98 (discussing wrongful executions and concerns about executing innocence persons from as far back as the 1600s); see James B. Christoph, *Capital Punishment and British Politics: The British Movement to Abolish the Death Penalty 1945–57* 97 (U. Chi. Press 1962) (stating “[a]bolitionists had long argued that under a capital punishment system the possibility always existed that an innocent person might be convicted and hanged, whereas under alternate punishments the mistake could be rectified”).

31. See Joshua Dressler, *Understanding Criminal Law* 16 (3d ed., Lexis Publg. 2001) (stating “[r]etributivists believe that punishment is justified when it is deserved”); Jeffrey L. Kirchmeier, *A Tear in the Eye of the Law: Mitigating Factors and the Progression toward a Disease Theory of Criminal Justice*, 83 Or. L. Rev. 631, 639–43 (2004).

32. Steiker & Steiker, *supra* n. 16, at 597–607.

33. See Charles I. Lugini, *Executing the Factually Innocent: The U.S. Constitution, Habeas Corpus, and the Death Penalty: Facing the Embarrassing Question at Last*, 1 Stan. J. Civ. Rights & Civ. Liberties 473 (2005); Steiker & Steiker, *supra* n. 16.

34. *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring); William Blackstone, *Commentaries on the Laws of England* 352 (Layston Press 1966) (noting “it is better that ten guilty persons escape, than that one innocent suffer”) (originally published 1769).

35. *In re Winship*, 397 U.S. at 363–64 (holding that the Due Process Clause requires the prosecutor to prove every element of a crime beyond a reasonable doubt and stating “[t]he reasonable doubt standard . . . is a prime instrument for reducing the risk of convictions resting on factual error”); see Smith, *supra* n. 8, at 1198 (noting that due to concerns about wrongful convictions and executions, “in the 1790s, British judges increasingly instructed jurors concerning what came to be known as the ‘beyond-reasonable-doubt’ standard of proof—initially, it appears, by instructing jurors to acquit if they had ‘any rational doubt’ as to a defendant’s guilt.”).

society that it is far worse to convict an innocent man than to let a guilty man go free,"³⁶ it is even worse to execute an innocent man or woman.

The execution of an innocent person thus calls into question the conscious and subconscious purposes of capital punishment. Consciously, such a discovery would raise questions about whether the system works and whether it serves retributive and deterrence functions. Unconsciously, there is an underlying psychological horror to the thought that someone who was innocent was executed. Under the theories of Ernest Becker and others, at the core of human nature is the subconscious fear of death,³⁷ and that subconscious fear might be increased in society as a result of a clear risk of wrongful executions.³⁸ Furthermore, a death penalty system that kills the innocent would not serve the punishment's symbolic functions in American society.³⁹

While innocence has been a concern throughout history, the amount of emphasis on the innocence issue in comparison to other death penalty abolitionist arguments, has varied at different times.⁴⁰ During some historical periods, other issues have predominated. For example, in the early 1800s, "popular debate about capital punishment . . . centered on removing what public officials saw as the troubling spectacle of public executions."⁴¹ In the early 1900s, arguments against the death penalty often

36. *Winship*, 397 U.S. at 372 (Harlan, J., concurring).

37. Ernest Becker, *The Denial of Death* 11–24 (Free Press 1973).

38. Jamie Arndt et al. state,

Capital punishment symbolically allows the state to remove the power of taking life from those who do so arbitrarily (offenders) and give it to those who will use it in a more predictable manner (at least theoretically) that is socially sanctioned (the state itself is delegating the power to the jury). Consequently, individuals are afforded some protection from death by the removal of the offender from society and by their own adherence to the laws of society.

Jamie Arndt, Alison Cook, Joel D. Lieberman & Sheldon Solomon, *Terror Management in the Courtroom: Exploring the Effects of Mortality Salience on Legal Decision Making*, 11 Psych. Pub. Policy & L. 407, 432 (2005).

39. Becker states,

The logic of killing others in order to affirm our own life unlocks much that puzzles us in history, . . . such as the Roman arena games. . . . For man, maximum excitement is the confrontation of death and the skillful defiance of it by watching others fed to it as he survives transfixed with rapture.

Ernest Becker, *Escape from Evil* 110–11 (Free Press 1975). One might argue that this symbolic function of the death penalty is subconsciously the primary function of the death penalty in American society. Donald P. Judges, *Scared to Death: Capital Punishment as Authoritarian Terror Management*, 33 U.C. Davis L. Rev. 155, 158–59 (1999).

Further, one way human beings deal with this death fear is through the embrace of one's culture as a way of connecting to something immortal and attacking people who do not fit within one's own worldview. Because the death penalty is one way that society subconsciously deals with the fear of death, it only functions as a protector against the fear of death if we execute those who threaten our culture, i.e., people who are guilty. Therefore, if we execute those who are innocent, the death penalty does not serve its function of aiding members of society in suppressing the death fear. "In sum, death awareness provokes defense of worldview, which can take the form of physically aggressive hyperpunitiveness against individuals who threaten one's worldview." *Id.* at 168–69; see Becker, *supra*.

Several psychologists have done experiments with results that support Becker's theories about the way people behave when reminded of death. *E.g.* Judges, *supra*, at 166; Tom Pyszczynski, Sheldon Solomon & Jeff Greenberg, *In the Wake of 9/11: The Psychology of Terror* (Am. Psychol. Assn. 2003) (documenting numerous studies showing that people who are reminded of death try to protect their own culture and worldviews by being cruel to people unlike them).

40. Similarly, the support for abolition of the death penalty has fluctuated throughout American history. See Theodore Hamm, *Rebel and a Cause: Caryl Chessman and the Politics of the Death Penalty in Postwar California, 1948–1974*, 11–37 (U. Cal. Press 2001); Kirchmeier, *supra* n. 10, at 6–18.

41. Hamm, *supra* n. 40, at 16.

focused on connections to prison reform and broader political and social change taking place during the Progressive Era.⁴² While the impact of the horrors of World War II led to increased concerns about the risk of executing innocent defendants in the years following the war,⁴³ much of the debate about the death penalty in the 1960s focused on issues besides innocence.⁴⁴

Concerns about wrongful executions never completely faded out of the death penalty debate. In the United States in the 1820s, Edward Livingston raised concerns about executing innocent defendants, and similar concerns were raised throughout the nineteenth and twentieth centuries by various death penalty critics.⁴⁵ Arguments relating to innocence did not disappear in the 1960s and 1970s and were often reshaped into constitutional issues instead of moral issues.⁴⁶

Beginning in the late 1980s, innocence issues grew in importance. In 1987, a law review article by Hugo Bedau and Michael Radelet emphasized the risk of executing innocent capital defendants.⁴⁷ The article, and later their book, identified a large number

42. *Id.* at 20. For example, after the Missouri state legislature voted to abolish capital punishment in 1917, one commentator noted that “‘the basic idea’ that death penalty opponents presented to the legislature ‘was that capital punishment forestalled the possibility of reformation.’” *Id.* (footnote omitted). Support for Progressive prison reform and abolition of the death penalty, however, “faded by the early 1920s.” *Id.* (footnote omitted). Around the same time, in 1912, a report by the American Prison Congress claimed to have found no wrongful executions in American history although the methodology of the report was questionable. Smith, *supra* n. 8, at 1215.

43. As Hamm explained,

The experience of World War II also gave new meaning to the familiar argument opposing the death penalty on the grounds that the innocent are sometimes executed. The United States bore no small share of the responsibility for the millions of innocent civilians killed worldwide during the war. Yet after the war part of America’s national mission involved protection of personal freedoms; unlike its totalitarian rival, America declared itself a nation where the rights of the individual took primacy over the power of the state.

Hamm, *supra* n. 40, at 29.

44. Steiker & Steiker, *supra* n. 16, 590–92. In the 1950s and 1960s, “the central critiques of the death penalty focused on its declining popular support and its arbitrary and inequitable distribution.” *Id.* at 592. Steiker and Steiker point out that when the Supreme Court in effect stopped executions in the United States in *Furman*, “the Court paid virtually no attention to the risk of executing innocents as an argument against the death penalty.” *Id.* at 593.

45. Haines, *supra* n. 20, at 87 (“[C]oncern over the possibility of miscarriages of justice . . . was expressed . . . throughout the nineteenth and twentieth centuries by such critics as Charles C. Burleigh, Horace Greeley, William Howells, Sing-Sing warden Lewis Lawes . . . as well as the American League to Abolish Capital Punishment.”); see also Smith, *supra* n. 8, at 1206 (“[O]pponents of the death penalty in nineteenth-century America and England seized upon the problem of wrongful execution to argue that the administration of the death penalty involved intolerable risk.”).

46. “Traditional abolitionist arguments—for example, the failure of execution as a deterrent, the inhumanity of executions, the danger of fatal miscarriages of justice—did not disappear from the debate. Rather, they were recast as constitutional issues whose historical origins lay in the civil rights and civil liberties movements.” Haines, *supra* n. 20, at 44.

47. Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 Stan. L. Rev. 21 (1987). The research of Professors Bedau and Radelet and their 1987 study have had a broad impact. “We know of no defender of the death penalty who, prior to 1987, was willing to make such a concession in public.” Michael L. Radelet & Hugo Adam Bedau, *The Execution of the Innocent, in America’s Experiment with Capital Punishment: Reflections of the Past, Present, and Future of the Ultimate Penal Sanction* 325, 341 (James R. Acker et al. eds., 2d ed., Carolina Acad. Press 2003) (referring to the inevitability that an innocent person has been or will be executed). The article has been cited in hundreds of academic articles as well as by judges in judicial opinions. *E.g. Marsh*, 126 S. Ct. at 2534 (Scalia, J., concurring) (noting the impact of the article, while criticizing its relevance and its conclusion that twenty-three innocent defendants have been executed in the twentieth century); see also Stephen J. Markman & Paul G. Cassell, *Protecting the*

of cases where defendants had been wrongly convicted of capital offenses. The authors concluded that twenty-three defendants executed in the twentieth century had been wrongfully executed.⁴⁸

From the late 1980s through today, a growing portion of the death penalty debate in the United States has focused on the risk of executing the innocent.⁴⁹ Since the late 1990s, abolitionists have emphasized the miscarriages of justice in a growing number of cases where innocent people have been released from death row.⁵⁰ Many of these discoveries have occurred only because of advances in science regarding DNA evidence.⁵¹ Around the same time, Innocence Projects were created to focus on innocence cases.⁵² Thus far, though, the new technology has not revealed the discovery of the execution of an innocent person.⁵³ The new discoveries of innocent among the living condemned, however, have led to a majority of Americans believing that an innocent person has been executed recently in the United States.⁵⁴

Innocent: A Response to the Bedau-Radelet Study, 41 Stan. L. Rev. 121 (1988).

48. Haines, *supra* n. 20, at 88 ("Of the 23 death sentences that were actually carried out, only one of the executions occurred after 1976."); Radelet, Bedau & Putnam, *supra* n. 6, at 271. Haines refers to James Adams, who was executed on May 10, 1984. *Id.* at 208 n. 33. Haines also noted that, since the publication of *In Spite of Innocence*, one person who was executed with a "credible and widely publicized [claim] of innocence" was Roger Keith Coleman. *Id.*

49. Haines, *supra* n. 20, at 87; Kirchmeier, *supra* n. 10, at 39–48; Steiker & Steiker, *supra* n. 16, at 594–96. There are a number of reasons that the risk of executing the innocent is a part of the criminal justice system. See e.g. Sara Darchshori et al., *Empire State Injustice: Based upon a Decade of New Information, a Preliminary Evaluation of How New York's Death Penalty System Fails to Meet Standards for Accuracy and Fairness*, 4 Cardozo Pub. L. Policy & Ethics J. 85 (2006); Samuel R. Gross, *Lost Lives: Miscarriages of Justice in Capital Cases*, 61 Law & Contemp. Probs. 125, 133–52 (1998).

50. "The Innocence Revolution has undoubtedly left its impact on the public at large. One primary impact has been waning public support for the death penalty. A Gallup Poll released in May 2003 indicated that '73% of Americans believe an innocent person has been executed under the death penalty in the last five years.'" Godsey & Pulley, *supra* n. 16, at 284.

51. Kirchmeier, *supra* n. 10, at 39–43. Liebman and Marshall discuss the impact of DNA testing:

It was not the number of DNA exonerations that mattered. By 1995, DNA testing had led to only three death row exonerations, and just twenty-five exonerations of inmates serving sentences other than death. What mattered was the message that the DNA cases drove home about the system's general fallibility—including cases where DNA testing was unavailable. The overwhelming majority of capital cases are not susceptible to verification through any sort of DNA testing because there is no biological evidence left by the perpetrator that can be tested with currently available technologies. Once courts, governors, legislators, and juries came to understand the flaws that DNA revealed, however, they became far more receptive to claims of innocence that were not supported by DNA.

Liebman & Marshall, *supra* n. 30, at 1607, 1651–52.

52. In 1992, Barry Scheck and Peter Neufeld established The Innocence Project at the Benjamin N. Cardozo School of Law as an organization that focused on exonerating innocent defendants with DNA evidence. See Jim Dwyer, Peter Neufeld & Barry Scheck, *Actual Innocence: When Justice Goes Wrong and How to Make it Right* (Signet 2001); see also Innocence Project, <http://www.innocenceproject.org/about/faq.php> (accessed Oct. 5, 2006). Since then, similar innocence projects have been created throughout the country. See Innocence Project, *Other Innocent Projects by State*, http://www.innocenceproject.org/about/other_projects.php (accessed Oct. 5, 2006).

53. Of course, one of the difficulties in discovering a person is innocent after the person is executed is that, assuming there was DNA evidence in the case and that it still exists, courts generally will not pay for DNA testing after the case is over. One author explained,

DNA seldom enters the picture—whether to convict someone, to rule out a potential suspect, or to free the wrongfully convicted. Unfortunately, DNA can't be counted on to solve most crimes or to overturn the vast majority of wrongful convictions. It isn't a magic bullet or a panacea. And even DNA testing is subject to human error. But it can help to rule out some innocents.

Scott Christianson, *Innocent: Inside Wrongful Conviction Cases* 6 (N.Y.U. Press 2004).

54. See Liebman & Marshall, *supra* n. 30, at 1651 n. 192 (noting that in 2003 seventy-three percent and in

B. Famous Wrongful Execution Cases in United States History

In United States history, the most famous wrongful execution case is that of Nicola Sacco and Bartolomeo Vanzetti.⁵⁵ Sacco and Vanzetti were two Italian immigrant anarchists who were executed in Massachusetts for the 1921s murder of a shoe-company paymaster and a guard during an armed robbery.⁵⁶ The fish-peddler and shoemaker were admitted anarchists, and the xenophobic patriotism of the early 1920s fueled their conviction.⁵⁷ Few today dispute that due process violations occurred at their trial, not to mention the prejudices that affected it. Trial Judge Webster Thayer at one point stated after court, ““Did you see what I did with those anarchist bastards the other day? I guess that will hold them for awhile.””⁵⁸

The Sacco and Vanzetti case drew national and international attention, and at the time of the execution of the Italian immigrants in April 1927, violent demonstrations were held in several nations.⁵⁹ American and international Communists rallied to use the case as propaganda about the problems with capitalism.⁶⁰ Liberal intellectuals and social activists also used the case to highlight problems in American society.⁶¹

The evidence of guilt in the Sacco and Vanzetti case is far from conclusive. Prior to the execution and before he was a Supreme Court Justice, Professor Felix Frankfurter wrote a study of the problems in the case.⁶² While some experts argue that the two men were guilty or that at least Sacco was guilty, many who have evaluated the evidence in recent years conclude that Sacco and Vanzetti were innocent.⁶³ Fifty years after their execution, the governor of Massachusetts proclaimed August 23, 1977, to be “Nicola Sacco and Bartolomeo Vanzetti Memorial Day” and declared “that [all] stigma and disgrace should be . . . removed . . . from the names of their families.”⁶⁴

2005 fifty-nine percent of people polled believed an innocent person had been executed in the last five years).

55. In 1926, a year before the Sacco and Vanzetti executions, another innocence case gained substantial attention, though it is less remembered today. Gerald Chapman, who was executed in Connecticut, was believed by many to be innocent. Stuart Banner, *The Death Penalty: An American History* 226 (Harvard U. Press 2002).

56. Frankfurter, *supra* n. 1, at 3–8; Louis B. Schwartz, *Book Review*, 114 U. Pa. L. Rev. 1260, 1260 (1966) (reviewing David Felix, *Protest: Sacco-Vanzetti and the Intellectuals* (Ind. U. Press 1965)).

57. Frankfurter *supra* n. 1, at 3–8.

58. *Id.* at 97–98.

59. ““Probably no single act committed by American authorities ever triggered such worldwide revulsion as the execution of Sacco and Vanzetti.”” *Book Note*, 92 Harv. L. Rev. 781, 781 (1979) (reviewing Roberta Strauss Feuerlicht, *Justice Crucified: The Story of Sacco and Vanzetti*, (McGraw-Hill Book Co. 1977)); see Radelet et al., *supra* n. 6, at 97.

60. Stephen Landsman, *Legal History: History's Stories*, 93 Mich. L. Rev. 1739, 1759–60 (1995) (reviewing James Goodman, *Stories of Scottsboro* (Pantheon Books 1994)). “Communist propagandists unceasingly argued that the case demonstrated the oppressive nature of capitalism.” *Id.* at 1759.

61. See *id.* at 1760. One commentator has “suggested that American liberal intellectuals transformed the case into a myth about the betrayal of innocence in America that they used to challenge the entrenched establishment and help facilitate their claim to power during the New Deal.” *Id.* at 1760 (citing David Felix, *Protest: Sacco-Vanzetti and the Intellectuals* 240–49 (Ind. U Press 1965)).

62. Frankfurter, *supra* n. 56.

63. See Radelet et al., *supra* n. 6, at 98–99. Massachusetts Governor Michael Dukakis granted Sacco and Vanzetti a posthumous pardon. Haines, *supra* n. 20, at 208 n. 31; cf. Robert H. Montgomery, *Sacco-Vanzetti: The Murder and the Myth* 347 (Devin-Adair Co. 1960) (concluding that “Sacco and Vanzetti had a fair trial, and the case would never have become a *cause célèbre* unless the Reds had made it one”).

64. Russell Aiuto, *The Legacy of Sacco & Vanzetti*, ch. 8, http://www.crimelibrary.com/notorious_murders/not_guilty/sacco/8.html (accessed Oct. 6, 2006). The proclamation by Governor Michael Dukakis asked

The execution of Sacco and Vanzetti resulted in some changes to society and the criminal justice system. The case energized the American League to Abolish Capital Punishment, an organization founded in 1925 that for decades supported campaigns to abolish the death penalty and that was an important link to later death penalty abolition movements.⁶⁵ Further, after the execution of Sacco and Vanzetti, Massachusetts reformed its review procedures,⁶⁶ and today Massachusetts does not have the death penalty.⁶⁷ Similarly, Great Britain does not have the death penalty partly due to the 1953 execution of Derek Bentley, a nineteen-year-old whose role in the murder of a London police officer was questionable.⁶⁸

There are a few other famous American alleged wrongful execution cases, such as the cases of Bruno Hauptmann and the Rosenbergs—though today many discount claims that these people were innocent.⁶⁹ Before and after Bruno Hauptmann's 1936 execution for the murder of the baby of Charles and Anne Lindbergh, many believed he was innocent, and today there are still advocates for his innocence.⁷⁰ However, because of

people to reflect on the "tragic events" and "draw from their historic lessons the resolve to prevent the forces of intolerance, fear, and hatred from ever again uniting to overcome the rationality, wisdom, and fairness to which our legal system aspires." *Id.*

65. Haines, *supra* n. 20, at 10–11. "The [American League to Abolish Capital Punishment] continued to emphasize the cases of possibly innocent death row inmates as long as the organization existed." *Id.* at 208 n. 31. Also, the execution of Sacco and Vanzetti led to the creation of the Massachusetts Council Against the Death Penalty. Alan Rogers, "Success—at Long Last": *The Abolition of the Death Penalty in Massachusetts, 1928–1984*, 22 B.C. Third World L.J. 281 (2002). The first Executive Director of the group was Sara Ehrmann, who was inspired by the Sacco and Vanzetti case to work for forty years in the struggle against capital punishment. *Id.* at 353.

66. Book Note, 95 Harv. L. Rev. 735, 737 (1982) (reviewing Brian Jackson, *The Black Flag: A Look Back at the Strange Case of Nicola Sacco and Bartolomeo Vanzetti* (citing Third Report of the Judicial Council of Massachusetts, Mass. L.Q., Nov. 1927, at 37; Mass. Gen. Laws Ann. ch. 178, § 33E (West 1981))).

67. The Sacco and Vanzetti case still stands "as a reminder to many Massachusetts legislators that the death penalty is immoral." Sigmund J. Roos, *Death Penalty's Lessons*, Christian Sci. Monitor 19, 19 (Nov. 13, 1997).

68. Christoph, *supra* n. 30, at 98–100. Fifteen minutes before the police officer was killed by Bentley's robbery accomplice, Bentley was taken into custody. *See id.* at 98. Although Bentley shouted, "Let him have it!" to his accomplice, it is still debated whether he meant that his accomplice should give the gun to the officer or whether he was encouraging him to shoot. Vivian Rakoff, *The Death Penalty and Youth*, Family Practice News 10, 10 (May 15, 2005). In 1998, Bentley received a conditional posthumous pardon. Donald S. Connery, *You, Me and the Death Penalty*, Hartford Courant 3 (Jan. 9, 2005) (noting the execution of three innocents in Great Britain—Timothy Evans, Derek Bentley and Mahood Matan—led to the abolition of the death penalty in that country); Andrew Robinson, *Hangman's Colourful Life for the Big Screen*, Yorkshire Post, <http://www.yorkshiretoday.co.uk/ViewArticle.aspx?SectionID=55&ArticleID=1187008> (Sept. 12, 2005).

69. Another case involving the men accused of the May 4, 1886, Haymarket bombing has been debated on innocence grounds over the years. *See generally* James Green, *Death in the Haymarket* (Pantheon Books 2006). After a bomb in Chicago killed several police officers and civilians, eight men were tried for the crime. Caleb Crain, *The Terror Last Time*, The New Yorker 82 (Mar. 13, 2006). Like the Sacco and Vanzetti case, the Haymarket investigation was inflamed by the fact that the accused were anarchists. *Id.* at 82–89. Although none of the eight were identified as throwing the bomb, "[t]he prosecution argued that anarchism itself constituted a conspiracy to commit murder, and the jurors agreed, sentencing all but one of the defendants to death." *Id.* at 82. Four of the men were subsequently executed, and after their deaths "they became martyrs in some circles." *Id.* at 88. The Haymarket affair also had some similarities to the Rosenbergs' case in that it has been called "the first major 'red-scare' in American history." *Id.* at 82.

70. The arguments for Hauptmann's innocence vary. Some argue he was completely innocent. *E.g.* Robert R. Bryan, *The Execution of the Innocent: The Tragedy of the Hauptmann-Lindbergh and Bigelow Cases*, 18 N.Y.U. Rev. L. & Soc. Change 831 (1991). Some claim he might have been an accomplice. *See e.g.* John F. Keenan, *The Lindbergh Kidnapping Revisited*, 84 Mich. L. Rev. 819, 822 (1986) (reviewing Ludovic Kennedy, *The Airman and the Carpenter: The Lindbergh Kidnapping and the Framing of Richard Hauptmann* (Viking 1985)). Some conspiracy theorists go so far as to claim that Charles Lindbergh himself was the murderer and that the national hero allowed Mr. Hauptmann to take the fall for the crime. *E.g.* Gregory Ahlgren & Stephen Monier, *Crime of the Century: The Lindbergh Kidnapping Hoax* (Branden Books 1993). The issue continues

Hauptmann's possession of some of the ransom money and evidence connecting him to the ladder apparently used in the kidnapping, many commentators conclude that he was involved in the crime.⁷¹

Similarly, the famous "innocence" execution case of the Rosenbergs generally is not seen as a case of innocence today. Ethel and Julius Rosenberg were executed on June 19, 1953, after being convicted of conspiracy to commit espionage.⁷² The trial occurred during "the height of anti-communist hysteria in America when fear of Communists and communism was widespread,"⁷³ and several aspects of the prosecution were troublesome, including the harshness of the sentence.⁷⁴ Even as the appeals were pending, international support for the Rosenbergs grew.⁷⁵ Pope Pius XII and Albert Einstein requested clemency for the couple.⁷⁶ As the time of execution approached, approximately 15,000 people gathered spontaneously in New York's Union Square to protest and hope for a last-minute reprieve from President Dwight Eisenhower.⁷⁷

Despite the widespread belief in the Rosenbergs' innocence, however, recently released government files in the United States and the former Soviet Union reveal that Julius Rosenberg was a spy, and the records indicate it is likely that Ethel Rosenberg supported her husband's activities.⁷⁸ Still, the Rosenbergs' case and the Hauptmann case, like the Sacco and Vanzetti case, were marked by errors so that even those who believe in their guilt are troubled by the lack of due process.⁷⁹

There are a few famous American wrongful execution cases that preceded Sacco

to be debated and, as recently as 2003, new "evidence" has created additional questions. Becky Batcha, *This Case Never Closes*, N.Y. Times 6 (June 29, 2003). Finally, until her death in 1994, Hauptmann's widow, Anna, argued for his innocence. *Hauptmann's Widow Dies*, N.Y. Times B12 (Oct. 19, 1994); Wayne King, *Defiant Widow Seeks to Reopen Lindbergh Case*, N.Y. Times 124 (Oct. 5, 1991). See Bernard Ryan, Jr., *Bruno Richard Hauptmann Trial*, in *American Trials of the 20th Century* 162-67 (Edward W. Knappman ed., 1995 ed., Visible Ink Press 1995); Russell Aiuto, *The Lindbergh Kidnapping*, ch. 13, http://www.crimelibrary.com/notorious_murders/famous/lindbergh/theories_8.html (accessed Jan. 24, 2007).

71. See e.g. John F. Keenan, *The Lindbergh Kidnapping Revisited*, 84 Mich. L. Rev. 819, 822 (1986) (reviewing Ludovic Kennedy, *The Airman and the Carpenter: The Lindbergh Kidnapping and the Framing of Richard Hauptmann* (Viking 1985)); Edmund Pearson, *A Reporter at Large: Hauptmann and Circumstantial Evidence*, *The New Yorker* 37-48 (Mar. 9, 1935); Anthony R. Tempesta, *Book Review*, 147 Mil. L. Rev. 293 (1995) (reviewing Jim Fisher, *The Lindbergh Case* (Rutgers U. Press 1995)). Others have argued, however, that the ladder "Rail 16" evidence was weak and possibly fraudulent. See Radelet et al., *supra* n. 6, at 100-01.

72. Sheila M. Brennan, *Popular Images of American Women in the 1950s and Their Impact on Ethel Rosenberg's Trial and Conviction*, 14 Women's Rights L. Rep. 43, 45-46 (1992).

73. Atossa M. Alavi, *The Government against Two: Ethel and Julius Rosenberg's Trial*, 53 Case W. Res. L. Rev. 1057, 1065 (2003).

74. *Id.* at 1065-86. Among several other problems, "[r]eleased FBI and Department of Justice confidential documents showed that Judge Kaufman had participated in highly irregular *ex parte* communications with the prosecution before passing sentence." *Id.* at 1089.

75. *Id.* at 1087-88.

76. Bernard Ryan, Jr., *Trials of Julius and Ethel Rosenberg and Morton Sobell: 1951*, in *American Trials of the 20th Century*, *supra* n. 70, at 232.

77. John Wexley, *The Judgment of Julius and Ethel Rosenberg* 536 (Balantine Bks. 1977).

78. Alavi, *supra* n. 73, at 1089; see Michael E. Parrish, *Revisited: The Rosenberg "Atom Spy" Case*, 68 U.M.K.C. L. Rev. 601 (2000) (noting that evidence released by United States government agencies indicating that Julius spied for the Soviet Union has been found to be "overwhelming," while Ethel's involvement was "marginal").

79. See e.g. Alavi, *supra* n. 73, at 1089-90 (noting that despite their probable guilt, the Rosenbergs were executed as scapegoats). The Hauptmann trial was held in a small town with a "circus-like" atmosphere, with jurors able to view the massive media attention, souvenir salespeople, and celebrities in the audience. See Keenan, *supra* n. 70, at 823.

and Vanzetti. One case is that of the union organizer and songwriter Joe Hill, who was executed in Utah in 1915 for the murder of two storekeepers.⁸⁰ There was limited circumstantial evidence in the case, and the conviction involved “collusion between the prosecution and the trial judge in an atmosphere of anti-union hostility.”⁸¹ Many, including President Woodrow Wilson and Helen Keller, supported Hill and requested reprieves on his behalf.⁸² Finally, if one examines American history prior to the 1900s, one finds other arguably wrongful executions such as the execution of Mary Surratt⁸³ for conspiring to kill President Abraham Lincoln and the execution of the Salem “witches.”⁸⁴

All of these cases, including the cases of the Rosenbergs and Hauptman, involved aspects that led to unfair trials, even if ultimately the defendants were guilty. For death penalty supporters, though, systemic problems that may create a risk of executing the innocent are significantly different from proving that an innocent person was executed. Thus, death penalty advocates can rely upon the claim that justice was ultimately served when these “guilty” people were executed. All of these cases, though, illustrate the difficulty in proving conclusive guilt or innocence through a human system of justice.

III. THE MODERN DEATH PENALTY ERA AND INNOCENCE

As noted earlier, innocence has become a larger part of the death penalty debate in the United States in recent years. A number of death row inmates have been exonerated, and there has been a drop in support for the death penalty because of these exonerations.⁸⁵ Justice Souter recently noted the growing number of exonerations of death row inmates and stated, “We are thus in a period of new empirical argument about

80. Radelet et al., *supra* n. 6, at 314; see Bernard Ryan, Jr., *Joe Hill Trial*, in *American Trials of the 20th Century*, *supra* n. 70, 49–51.

81. Radelet et al., *supra* n. 6, at 314.

82. *Id.*; *Joe Hill: The Man Behind the Martyr*, <http://www.kued.org/joehill/story/keller.html> (accessed Jan. 24, 2007).

83. Mary Surratt was executed for her alleged involvement in the conspiracy to kill President Abraham Lincoln. See generally Elizabeth Steger Trindal, *Mary Surratt: An American Tragedy* (Pelican Publ. Co. 1996). Surratt's son John was involved in the assassination conspiracy with John Wilkes Booth, George Atzerodt, David Herold, and Lewis Powell. *Id.* Although planning meetings took place at Mary Surratt's home, the evidence of her involvement in the conspiracy was questionable. See Lionel Van Deerlin, *History Casts Doubts on Tribunals*, Union-Tribunal B7 (Nov. 21, 2001) (stating that “nowhere does one find clinching evidence of Mrs. Surratt's involvement” in the conspiracy). Mary Surratt was tried by a military tribunal and hanged with the other surviving accused assassins on July 7, 1865, although many prominent citizens supported her and asked President Andrew Johnson to stay her execution. See generally Trindal, *supra* n. 83; *Biography of Mary Surratt*, <http://www.law.umkc.edu/faculty/projects/ftrials/lincolnconspiracy/surrattm.html> (accessed Jan. 24, 2007).

Interestingly, Mary Surratt may be the one wrongful execution that had the biggest impact on United States history of any wrongful execution. President Andrew Johnson's impeachment trial in 1868 resulted from his firing of Secretary of War Edwin Stanton for, among other things, having deliberately withheld from Johnson a petition for Ms. Surratt's commutation from five members of the military commission that condemned her. See Douglas O. Linder, *A Trial Account*, <http://www.law.umkc.edu/faculty/projects/ftrials/impeach/impeachmt.htm> (accessed Jan. 24, 2007).

84. Beginning with accusations of witchcraft that started in Salem in 1692, nineteen people were executed and one man named Giles Corey was pressed to death under rocks because he refused to plead or testify. Lawrence M. Friedman, *Crime and Punishment in American History* 45–46 (BasicBooks 1993).

85. Kirchmeier, *supra* n. 10, at 20, 39–43. As of November 2006, the Death Penalty Information Center listed 123 death row inmates who have been found to be innocent since 1973. Death Penalty Info. Ctr., *Innocence: List of Those Freed from Death Row*, <http://www.deathpenaltyinfo.org/article.php?scid=6&did=110> (accessed Jan. 24, 2007).

how ““death is different.””⁸⁶

Those exoneration cases have focused on death row inmates found to be innocent while they were still alive. While those cases highlight the serious risk and likelihood of executing innocent defendants under our current legal system, since *Gregg v. Georgia* was decided there has not been conclusive proof that an innocent defendant has actually been executed.

However, there have been recent cases where arguments have been made about the innocence of an executed inmate. There was a fair amount of media attention on the case of Roger Coleman regarding his possible innocence, although new evidence indicates his guilt. In another case, there has been little attention, but the inmate, Larry Griffin, is likely innocent. These two cases, and a few other recent cases, are discussed below.

A. *Roger Coleman*⁸⁷

Roger K. Coleman was executed in Virginia in 1992 after being convicted of raping and murdering Wanda McCoy, the nineteen-year-old sister of his wife, in Grundy, Virginia.⁸⁸ At Coleman’s trial, the coal miner was convicted on evidence that included hairs found at the crime scene, a spot of blood on Coleman’s pants that matched McCoy’s blood, and a prisoner who testified that Coleman had confessed in jail.⁸⁹ In postconviction proceedings and as the execution approached, however, Coleman’s attorneys argued that Coleman was innocent.⁹⁰

In state court, a procedural issue arose that kept the Virginia Supreme Court from reviewing Coleman’s claims, and the issue ultimately went to the United States Supreme Court. The issue arose out of an attorney error in the state courts. After losing his direct appeal, Coleman filed a petition for a writ of habeas corpus in the Virginia circuit court raising new claims.⁹¹ After losing in that court in 1986, he filed a notice of appeal with the circuit court thirty-three days after the entry of the final judgment, and then he filed a petition for appeal in the Virginia Supreme Court.⁹² The Commonwealth of Virginia responded by filing a motion to dismiss the appeal because Coleman’s notice of appeal was filed after the thirty-day deadline required by a Virginia Supreme Court rule.⁹³ In 1987, the Virginia Supreme Court dismissed Coleman’s appeal in a brief order that mentioned the motion to dismiss but did not explain the reasons for granting the motion or mention the Virginia Supreme Court rule.⁹⁴

86. *Marsh*, 126 S. Ct. at 2545 (Souter, J., dissenting) (citing *Gregg*, 428 U.S. at 188).

87. In the interest of full and perhaps unnecessary disclosure, for a period prior to Roger Coleman’s execution, I was an associate at the law firm that represented him, but I had no involvement in his case and nothing in this article is information from that firm’s representation.

88. James Dao, *DNA Ties Man Executed in '92 to the Murder He Denied*, N.Y. Times A14 (Jan. 13, 2006).

89. *Id.*

90. See Tucker, *supra* n. 21, at 110–16; review notes 92 to 98 *infra* and accompanying text.

91. *Coleman v. Thompson*, 501 U.S. 722, 727 (1991).

92. *Id.* A notice of appeal in Virginia is not an extensive document that raises claims or arguments. It is filed in the trial court to notify that court and the Virginia Supreme Court that there will be an appeal. *Id.* at 742. “[I]t is a purely ministerial document.” *Id.*

93. *Id.* Because the thirtieth day fell on the weekend, the notice was filed only one day late. See *infra* note 101.

94. *Coleman*, 501 U.S. at 727–28.

Coleman then proceeded to federal court by filing a petition for writ of federal habeas corpus that raised, among other claims, seven claims that had been raised for the first time on the state habeas proceedings.⁹⁵ The United States District Court for the Western District of Virginia concluded that the seven claims were procedurally defaulted because of the Virginia Supreme Court's dismissal.⁹⁶ Under procedural default doctrine, a federal court "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment."⁹⁷ However, despite the ruling that the claims were defaulted, the district court addressed the merits of all of Coleman's eleven claims, including the seven that were procedurally defaulted, and ruled against Coleman.⁹⁸ The United States Court of Appeals for the Fourth Circuit affirmed the result, holding that Coleman had defaulted on the seven claims.⁹⁹

The United States Supreme Court accepted review of Coleman's case to address whether the late notice of appeal resulted in a procedural default that prevented the federal courts from reviewing the claims.¹⁰⁰ In an opinion by Justice O'Connor, the Court held that it was clear that the Virginia court had based its decision upon the late filing.¹⁰¹ Therefore, because the decision was based upon adequate and independent state grounds, Coleman's claims were procedurally defaulted.¹⁰² Although a defendant could overcome a procedural bar by showing "cause and prejudice," the Court held that even if Coleman's post-conviction attorney were ineffective for filing the notice of appeal late, such ineffectiveness would not establish "cause" to overcome the procedural default.¹⁰³

Thus, the federal courts did not need to address the defaulted claims on their merits because the Virginia Supreme Court had apparently decided its rejection of the claims

95. *Id.* at 728.

96. *Id.*

97. *Id.* at 729.

98. *Id.* at 728.

99. *Coleman*, 501 U.S. at 728–29.

100. Justice O'Connor's opinion notes that the notice of appeal was filed three days late. *Id.* at 727. However, the numbers are a little misleading. Coleman's attorney had thirty days to file the notice of appeal from the date of the lower court's order. *Id.* The lower court's order was dated September 4 and mailed September 9. Tucker, *supra* n. 21, at 114. Coleman's attorneys erroneously assumed that the thirty days counted from the mailing date, but it was due thirty days from the order date of September 4. *Id.* at 114–15. Thirty days from September 4 fell on Saturday, October 4. Because of the weekend dates, the notice was due on the following Monday, October 6. *Id.* Coleman's attorneys mailed the notice on October 6, but it was not delivered until October 7, so it was one day past the October 6 deadline. *Id.* If one were to rely upon the Supreme Court opinion, however, one would think that Coleman's attorneys were three days late.

101. *Coleman*, 501 U.S. at 735–44. Coleman argued that *Michigan v. Long*, 463 U.S. 1032 (1983), and *Harris v. Reed*, 489 U.S. 255 (1989), created a presumption that state court decisions are based upon federal law unless the state court clearly and expressly states that the decision was based upon state procedural grounds. *Coleman*, 501 U.S. at 735–36. The Supreme Court, however, clarified that the presumption "applies only when it fairly appears that a state court judgment rested primarily on federal law or was interwoven with federal law." *Id.* at 739. Here, the Court reasoned, the *Harris* presumption did not apply because, even though the Virginia Supreme Court did not state the basis for its analysis, the motion to dismiss was only based upon the state procedural rule. *Id.* at 740.

102. *Coleman*, 501 U.S. at 756–57.

103. *Id.* at 755–57. "Because Coleman had no right to counsel to pursue his appeal in state habeas, any attorney error that led to the default of Coleman's claims in state court cannot constitute cause to excuse the default in federal habeas." *Id.* at 757.

based upon the fact that the late filing violated a state procedural rule.¹⁰⁴ Although the claims raised questions about Coleman's guilt, Justice O'Connor summed up the Court's approach and foreshadowed its conclusion with the opening sentence of her opinion: "This is a case about federalism."¹⁰⁵

As Coleman's execution date approached, his advocates continued to argue his innocence, focusing on the injustice of the federal courts' refusal to hear his claims because his attorney filed a late notice.¹⁰⁶ During the week of Coleman's scheduled execution, his picture appeared on the cover of *Time Magazine* with bold letters stating "This Man Might Be Innocent. This Man is Due to Die" over his photo.¹⁰⁷ Days before his execution, Coleman appeared on *Larry King Live*, *Nightline*, *Good Morning America* and the *Today* show.¹⁰⁸ *The New York Times* claimed that there were "deep doubts" about Coleman's guilt and that "an unusually strong case can be made . . . that Virginia is trying to execute the wrong man."¹⁰⁹

There were reasons that many people believed Coleman was innocent. One of the issues in the case involved the timing of the rape and Coleman's alibi. Coleman claimed that at the time of the murder he was miles away from the crime, and other witnesses claimed that another person bragged about committing the murder.¹¹⁰ Another witness supported Coleman's alibi, which would not have given Coleman enough time to get to the scene of the crime.¹¹¹ There were no witnesses to the crime, and the case against

104. The Supreme Court's ruling in Coleman's case is still good law, so other attorneys who miss filing deadlines and make other mistakes will prevent federal courts from reviewing claims of capital defendants. Although there are ways to get around the procedural default hurdles, as there were available at the time of Coleman's case, the exceptions are narrow.

After Coleman was executed, Congress passed the Anti-Terrorism and Effective Death Penalty Act (AEDPA) in 1996. Pub. L. No. 104-132, 110 Stat. 1214, 1219 (1996); see Larry W. Yackle, *State Convicts and Federal Courts: Reopening the Habeas Corpus Debate*, 91 Cornell L. Rev. 541, 541 (2006). AEDPA added additional hurdles to habeas review where, for example, a previous federal habeas corpus attorney failed to discover and raise issues of innocence. 128 U.S.C. § 2255 (2006) (stating that to bring second or successive motion claims on the basis of new evidence, the petition must contain "newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense"); see Lyn S. Entzeroth, *Struggling for Federal Judicial Review of Successive Claims of Innocence: A Study of How Federal Courts Wrestled With the AEDPA to Provide Individuals Convicted of Non-Existent Crimes With Habeas Corpus Review*, 60 U. Miami L. Rev. 75, 88 (2005) ("[A] second or successive motion under the AEDPA is only allowed if there is new evidence that meets a very high evidentiary burden in establishing innocence, or if there is a new rule of constitutional law that the Supreme Court applies retroactively to cases pending on collateral review.").

Thus, the combination of the Coleman Supreme Court decision, AEDPA, and the discovery of innocent people on death row increases the probability of innocents being executed. See also *Herrera v. Collins*, 506 U.S. 390, 417 (1993) (indicating that, assuming a claim of innocence by itself could warrant relief, the petitioner would have to meet a high standard of making a "truly persuasive demonstration of 'actual innocence.'"); but see *id.* at 427-28 (Scalia & Thomas, JJ., concurring) ("There is no basis in text, tradition, or even in contemporary practice (if that were enough) for finding in the Constitution a right to demand judicial consideration of newly discovered evidence of innocence brought forward after conviction.").

105. *Coleman*, 501 U.S. at 726.

106. See e.g. Tucker, *supra* n. 21, at 246-51, 273-74.

107. *Id.* at 276-77; *Time Mag.*, *supra* n. 22.

108. Tucker, *supra* n. 21, at 289.

109. A. Barton Hinkle, *Individual Cases Do Not Have Transcendental Meaning*, Richmond Times-Dispatch A11 (Mar. 21, 2006).

110. Green, *supra* n. 7.

111. Frankel, *supra* n. 24, at 19.

Coleman was based upon circumstantial evidence.¹¹² Finally, the defense team eventually uncovered evidence that another man who lived in the area had been accused of similar crimes.¹¹³

There were other factors that made Coleman's innocence claims questionable. Coleman failed a lie detector test, but the test was given a day before his execution under pressure conditions that could explain the failure.¹¹⁴ Coleman had made similar proclamations of innocence for a prior sexual assault crime for which he was convicted, and those denials made his denials of this murder less believable.¹¹⁵ One of Coleman's cellmates claimed that Coleman confessed to Wanda McCoy's murder.¹¹⁶ Finally, DNA testing in 1990 on an extremely limited sample did not exclude Coleman as possibly being the rapist.¹¹⁷

Coleman was executed on Wednesday, May 20, 1992.¹¹⁸ As guards strapped Coleman into the electric chair, he stated, "When my innocence is proven, I hope Americans will recognize the injustice of the death penalty."¹¹⁹ Ninety-five percent of the more than 6,000 messages sent to Virginia Governor Wilder supported Coleman.¹²⁰ On the night of Coleman's execution, "media from all over the USA mobbed the prison" and "[a] sea of broadcast satellite dishes lined the streets" near the prison.¹²¹

Although in most cases, an execution would have ended the story, the debate about Coleman's guilt or innocence continued. Among others, James McCloskey, the executive director of Centurion Ministries, continued fighting to prove Coleman was innocent after Coleman's execution.¹²²

112. *Id.* at 12.

113. *Id.* at 21.

114. Tucker, *supra* n. 21, at 305–14. Coleman's attorneys debated about whether or not to let Coleman take the polygraph test so close to the execution but felt they had little choice. *Id.* The lawyers hoped that if Coleman passed, Virginia Governor Douglas Wilder would grant a stay of execution, but they also worried that the conditions of the test made it unreliable. *Id.* at 307. Not only was Coleman exhausted at the time with his execution time nearing, he was not given his usual back pain pills before being transported to take the test in unfamiliar surroundings. *Id.* at 309–10. However, now that the post-execution DNA testing has indicated Coleman's guilt, it appears the polygraph test was accurate.

115. Frankel, *supra* n. 24, at 12. While in high school, Coleman was accused of attempting to rape a schoolteacher. *Id.* Although Coleman denied the charge and his high school principal provided an alibi, Coleman was convicted and served twenty months in prison. *Id.* Also, two months before McCoy's murder, a woman claimed that Coleman had masturbated in front of her at a public library though Coleman was not charged in that incident until after he was arrested for McCoy's murder. *Id.* at 11.

116. *Id.* at 19.

117. Frankel, *supra* n. 24, at 19. The testing of a very small sample of semen remaining in evidence indicated that the approximately two percent of the population who could have supplied the semen included Coleman. *Id.* However, Coleman's counsel argued that because the sample included sperm from two people, it was unreliable and also indicated that perhaps there were two rapists on a night when Coleman was alone. *Id.* at 21.

118. Green, *supra* n. 7. Coleman had been a model prisoner and founded a program to counsel troubled young men. Frankel, *supra* n. 24, at 11.

119. Green, *supra* n. 7.

120. Frankel, *supra* n. 24, at 23.

121. Tony Mauro, *Virginia Executes Killer Coleman*, USA Today A3 (May 21, 1992).

122. Green, *supra* n. 7. McCloskey conceded that the 2006 DNA testing proved Coleman's guilt in a statement issued after the DNA tests were revealed. The testing "means that Roger Coleman is the killer of Wanda McCoy. We now know that Roger's proclamations of innocence, even as he sat strapped in the electric chair moments before his death, were false." *Id.* McCloskey, who spent six years advocating for the post-execution DNA tests, said that the results felt "like a kick in the stomach." *Id.*; see Frankel, *supra* n. 24, at 24. Other people who devoted a large amount of time to the case on Coleman's behalf included attorney Kathleen Beehan, Coleman's girlfriend Sharon Paul, and Marie Deans, who was the head of the Virginia Coalition of

More than a decade later, in January 2006, Coleman's case was again in the news when DNA testing ordered by Virginia Governor Mark Warner in effect confirmed Coleman's guilt.¹²³ The news was disappointing to Coleman's supporters.¹²⁴ Death penalty proponents were vindicated by the fact that Coleman was guilty.¹²⁵ They could argue that the system worked. However, they did not note one thing that the death penalty took away from those seeking justice. Had Coleman been given a life sentence, he would have been alive and in prison to face his supporters about his lies. Coleman died telling the world he was innocent and with faith that many would believe him forever.

The evidence of Coleman's guilt probably did not change many minds about the death penalty. While opponents of the death penalty noted that the result was at most a temporary setback, "[d]eath penalty supporters said that while the results might erode the credibility of some of Coleman's supporters, it would not have a dramatic effect on the [capital punishment] debate."¹²⁶

B. Larry Griffin¹²⁷

A few years after Coleman's execution, Larry Griffin was executed in Missouri on June 21, 1995, for the 1980 fatal shooting of a drug dealer named Quintin Moss.¹²⁸ A bystander who also was wounded in the drive-by shooting, Wallace Conners, knew Griffin and told police that Griffin was not one of the shooters, but Conners did not testify at Griffin's trial.¹²⁹ Instead, the key witness at Griffin's trial was Robert Fitzgerald, a person who was in the federal witness protection program and claimed that he had seen that Griffin was one of the shooters.¹³⁰

Jails and Prisons. *Id.*

123. Green, *supra* n. 7 ("A Canadian laboratory . . . estimate[d] the odds that someone other than Coleman could have left the DNA 'fingerprint' found in a vaginal swab taken from the victim to be 1 in 19 million."). DNA testing was not available when Coleman was tried, but the DNA tests available in 1990 prior to Coleman's execution revealed that Coleman was among two percent of the population who might have committed the crime. *Id.* More than twenty years after Coleman's execution, ABC's *Nightline* covered McCloskey's reaction to the news about the DNA evidence. Frankel, *supra* n. 24, at 10.

124. Leonard Pitts, *The Truth about Roger Coleman Hurts*, Buffalo News A7 (Jan. 18, 2006) ("For those who believed in Coleman's innocence, to say nothing of those who simply believe capital punishment an unwieldy, unfair and uncivilized way of punishing crime, the news is a bitter blow.").

125. Joshua Marquis, *The Innocent and the Shammed*, N.Y. Times A23 (Jan. 26, 2006) ("Americans should be far more worried about the wrongfully freed than the wrongfully convicted."); Pitts, *supra* n. 124 ("[O]ne imagines [the news of Coleman's guilt] is received more warmly by death penalty advocates The state's criminal justice system stands vindicated.").

126. Steve Mills, *New DNA Tests Affirm Guilt of Executed Man*, Chi. Trib. 11 (Jan. 13, 2006). Justice Scalia, however, did discuss the DNA tests in the Coleman case in a recent opinion to support his point that no innocent inmates have been executed. *Marsh*, 126 S. Ct. at 2533 (Scalia, J., concurring).

127. In addition to reports about Larry Griffin, there also have been recent questions about the guilt of Ruben Cantu, who was executed in 1993. *Executions: Death Sentences Cut in Half Since Late 1990s*, Aberdeen Am. News (South Dakota) A7 (Nov. 25, 2005). Recently, the only witness in the case and Cantu's co-defendant have asserted that Cantu was innocent. *Id.*

128. *Id.*; Herbert, *supra* n. 28. One of the reasons the investigation focused on Larry Griffin was that six months before Moss was killed, Larry Griffin's brother, Dennis Griffin, had been murdered and many thought that Moss was involved in Dennis's killing. Gross & Thompson, *supra* n. 29.

129. Herbert, *supra* n. 28.

130. *Id.* In a 1983 dissenting opinion in an appeal in the case, Missouri Supreme Court Justice Blackmun noted, "The only eyewitness to the murder had a seriously flawed background, and his ability to observe and

Although there was no physical evidence and no other witness to place Griffin at the scene of the crime, the testimony of Fitzgerald was enough to convict Griffin.¹³¹ Fitzgerald, a user of heroin and speed, had a number of felony charges pending against him at the time, but he was formally released from custody the same day that Griffin was convicted.¹³²

Since then, Fitzgerald's identification has been undermined by an NAACP Legal Defense and Educational Fund investigation led by Professor Samuel Gross of the University of Michigan Law School.¹³³ The investigation has led the circuit attorney in St. Louis to reopen the murder investigation even though Griffin has already been executed.¹³⁴

In addition to the statements by Connors that Griffin was not at the scene of the crime, the investigation has revealed that a police officer who at trial supported Fitzgerald's testimony now has a different story.¹³⁵ The officer now says that Fitzgerald had told him, "I didn't see nothing."¹³⁶

The NAACP Report reveals other problems with the case. Fitzgerald's identification of Griffin came when the police showed Fitzgerald one photograph of Griffin.¹³⁷ Showing a witness one photograph instead of a photo array is a notoriously unreliable identification device.¹³⁸ Physical evidence, such as fingerprints found on the car used in the shooting, does not point toward Larry Griffin.¹³⁹ The NAACP Report concludes that the evidence together points toward the fact that three other people, not including Larry Griffin, were in the car when the killing took place.¹⁴⁰

Thus, based upon the new evidence that the testimony of the sole testifying eyewitness was false and that there was another eyewitness who all along has stated that Larry Griffin did not do the shooting, it is quite possible that Griffin was executed for a crime he did not commit. Because St. Louis prosecutors are re-investigating the case,¹⁴¹ perhaps further investigation will reveal who the killers are and make Griffin's innocence clearer.

C. Other Recent Potential Wrongful Executions

In addition to Larry Griffin, a number of other recent executed inmates have supporters.¹⁴² Sister Helen Prejean, the author of *Dead Man Walking*,¹⁴³ a book that is

identify the gunman was also subject to question." *State v. Griffin*, 662 S.W.2d 854, 860 (Mo. 1983).

131. Herbert, *supra* n. 28.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. Herbert, *supra* n. 28.

137. Gross & Thompson, *supra* n. 29.

138. *E.g. Manson v. Brathwaite*, 432 U.S. 98 (1977) (upholding constitutionality of using one photograph but noting that a photographic array would have been a better way of obtaining an identification).

139. Gross & Thompson, *supra* n. 29, at 4. The car from the shooting "was found that night with the murder weapons still in it. Various fingerprints were found in the car but none belonged to Larry Griffin." *Id.* at 2. A traffic ticket of Larry Griffin's cousin, Reggie Griffin, was found in the car. *Id.*

140. *Id.* at 8-9.

141. Kate Zernike, *In a 1980 Killing, a New Look at the Death Penalty*, N.Y. Times A15 (July 19, 2005).

142. Professor James Liebman has noted that in "the cases of perhaps forty to seventy-five among the 700 men and women who have been executed in the modern capital-sentencing era in this country," there are left

one of the foundations of the modern Moratorium Movement,¹⁴⁴ recently wrote a new book, *The Death of Innocents*.¹⁴⁵ The book focuses on two people she claims were wrongfully executed: Dobie Williams and Joseph O'Dell, who, like Coleman, was executed in Virginia.¹⁴⁶ Recently the Innocence Project assembled several experts who concluded that Texas's execution of Cameron Todd Willingham in 2004 was based upon invalid evidence.¹⁴⁷ In 2006, the *Chicago Tribune* argued that Texas executed an innocent man named Carlos de Luna in 1989.¹⁴⁸

Finally, there are questions about the guilt of Ruben Cantu, who was executed in 1993 in Texas.¹⁴⁹ Since the execution, the only witness to the crime recanted the identification, and a co-defendant claims that he falsely accused Cantu under police pressure.¹⁵⁰ Recently, Cantu's case received a significant amount of attention because a series of articles in the *Houston Chronicle* and the *San Antonio Express-News* focused on his possible innocence.¹⁵¹ An added twist to Cantu's case is that he was seventeen when he was charged with capital murder for the shooting of a man during an attempted robbery.¹⁵² Under a case decided after his execution and because of his youth, Cantu could not be executed today.¹⁵³ Thus, it is possible that Cantu was among the "unluckiest of the unlucky"¹⁵⁴ and not among the "worst of the worst" because he was executed for a crime he did not commit and because, had the Supreme Court decided the age question earlier, he would not have been executed even if he were guilty.

police files where "lie untested, but potentially exonerative, biological samples." James S. Liebman, *The New Death Penalty Debate: What's DNA Got to Do With It?* 33 Colum. Hum. Rights L. Rev. 527, 553 (2002). However, despite requests from the media and others, "the responsible officials have thus far resisted post-execution DNA testing." *Id.*

143. Helen Prejean, *Dead Man Walking: An Eyewitness Account of the Death Penalty in the United States* (Vintage Books 1993).

144. Kirchmeier, *supra* n. 10, at 22–25 (discussing the impact of Sister Prejean's book).

145. Helen Prejean, *The Death of Innocents: An Eyewitness Account of Wrongful Executions* (Random House 2005).

146. *Id.* O'Dell was executed on July 23, 1997. *Id.* Dobie Williams was executed in Louisiana in January 1999. *Id.*

147. See Maurice Possley, *Report: Inmate Wrongly Executed: Arson Experts say Evidence in Texas Case Scientifically Invalid*, Chi. Trib. 1 (May 3, 2006). The report of the errors in the evidence that supported Willingham's conviction for the arson-murders of his three daughters supported a similar conclusion found by the *Chicago Tribune* in 2004. *Id.* New understandings about the science of arson indicate that the fire in the case was accidental. See Rob Warden, *Uncertainty Principle Is Wrong Theory for the Death Penalty*, Chi. Sun-Times 18 (Jan. 21, 2006).

148. Howard Witt, *Texas Urged to Probe Claims of Wrongful Executions*, Chi. Trib. 6 (July 7, 2006) ("The Tribune series found that De Luna's case was compromised by unreliable eyewitnesses, sloppy police work and a failure by prosecutors to pursue evidence pointing to another man who later bragged he was the killer before he died in prison.")

149. Associated Press, *12 Years After Execution, Evidence of Innocence*, N.Y. Times A18 (Nov. 22, 2005).

150. *Id.*

151. E.g. Lise Olsen, *The Cantu Case: Death and Doubt*, Houston Chronicle, <http://www.chron.com/dispatch/story.mpl/metropolitan/3472872.html> (July 24, 2006) Lise Olsen & Maro Robbins, *Lawyers Join Chorus for an Outside Cantu Review*, Houston Chronicle A1 (July 25, 2006); Lise Olsen & Maro Robbins, *Tapes Spur Calls for DA to Relinquish Cantu Case*, San Antonio Express-News, <http://www.mysanantonio.com/news/crime/stories/MYSA072506.1A.CantuFollo.14c6778.html> (July 24, 2006) (listing other articles in the series).

152. Associated Press, *supra* n. 149.

153. *Roper v. Simmons*, 543 U.S. 551, 578–79 (2005).

154. See Symposium, *Rethinking the Death Penalty: Can We Define Who Deserves Death?* 24 Pace L. Rev. 107, 141–42 (2003).

IV. SIX REASONS SOME WRONGFUL EXECUTION CASES GET MORE ATTENTION THAN OTHERS

Because the point in proving the innocence of an executed inmate is to attack the death penalty, death penalty opponents must gather significant attention on such cases to be successful. If nobody hears about an executed innocent defendant, the case will have no impact on popular opinion. Thus, it is essential to examine the *Coleman* and *Griffin* cases, as well as the other cases from history, to consider how innocence cases gain significant national attention.

Larry Griffin's innocence case received some attention but not an overwhelming amount. A search of the Lexis News Database for stories about Larry Griffin found approximately one hundred stories.¹⁵⁵ By contrast, Roger Coleman's case received much more attention. A search of the News database of Lexis found more than five hundred stories.¹⁵⁶ Although Coleman's execution was three years earlier than Griffin's execution, the three-year difference does not account for the disparity in coverage. Additionally, Coleman's case received a substantial amount of coverage before he was executed, including *Time Magazine* and various national television programs.¹⁵⁷

There are several reasons historically why some innocence cases receive more attention than others. First, substantial resources are often devoted to some cases. Second, there are organizations, usually with a political agenda, that are willing to devote those substantial resources to the case. Third, cases with famous victims or defendants get a substantial amount of attention. Fourth, cases with white defendants and white victims have received more attention than cases with defendants and victims of color. Fifth, innocence claims gain more resonance if they are promoted prior to the inmate's execution rather than being developed after the execution. Finally, an innocence case where innocence can be conclusively established will gain more attention than cases where innocence is not conclusive.

Considering the first lesson, there were substantial resources devoted to Coleman's case. Part of the reason for the extensive coverage was the work of Jim McCloskey, Coleman's attorneys, and others who conducted a high-profile media campaign aimed at getting a commutation for Coleman.¹⁵⁸ Once Coleman lost in the courts because the state notice of appeal had been filed one day late, strategically it made sense for Coleman's supporters to focus on other avenues besides the courts. Coleman's supporters sent out press kits to publications and wrote to celebrities for support.¹⁵⁹ Other death penalty opponents joined the media campaign, and it snowballed into an international *cause célèbre* with Pope John Paul II requesting mercy and Mother Teresa phoning the governor's chief counsel.¹⁶⁰

155. A LEXIS search of the terms "((larry /2 griffin) and "death penalty")" in the NEWS Library and the ALLNWS File on February 6, 2007, found 107 stories.

156. A LEXIS search of the terms "((roger /2 coleman) and "death penalty")" in the NEWS Library and the ALLNWS File on February 6, 2007, found 549 stories. Approximately one hundred of those stories were about the January 2006 DNA results in the case, so that might explain for some of the disparity between the coverage of Coleman's case and Griffin's case.

157. *Supra* nn. 105, 120.

158. Frankel, *supra* n. 24, at 20–23.

159. *Id.*

160. *Id.*

Regarding the second lesson, other defendants like Coleman have received massive media attention because people outside the prison had the motivation and were willing and able to devote time and resources to promoting the case. For example, a large number of people and organizations promoted the Sacco and Vanzetti case as an illustration of problems with the American justice and capitalist systems.¹⁶¹ Thus, we remember the names of Sacco and Vanzetti today, perhaps for their innocence, but definitely because of the attention generated by various political groups. Similarly, political issues in the cases of Joe Hill and the Rosenbergs were essential to the notoriety of those cases.¹⁶²

Third, some cases may receive added attention because of the fame of the accused murderer or the fame of the victim. Joe Hill already had obtained some stature as a songwriter and labor activist prior to the time he was accused of murder.¹⁶³ Bruno Hauptman's case was well known because he was accused of the murder of a child of an American hero. Without the fame of Joe Hill or the Lindbergh child, the defendants in those cases likely would have received little support. However, pre-crime fame of the victim or of the defendant did not play a role in either Coleman's or Griffin's case.

Fourth, one other obvious difference between Roger Coleman's case and Larry Griffin's case is that Roger Coleman and his victim were white¹⁶⁴ while Larry Griffin and the victim in his case were black.¹⁶⁵ Many capital defendants who receive the most media attention are white. Other authors have noted the large amount of attention that Karla Faye Tucker received as a white woman who found religion, compared to the miniscule attention to the black males who find religion on death row.¹⁶⁶ Although part of the reason Tucker received attention was because she was a woman, other black women who have been executed have not received anywhere near the amount of attention she did. Similarly, even when innocence is not an issue, there has been more

161. One harsh critic of the innocence claims of Sacco and Vanzetti wrote:

[The American Civil Liberties Union and the International Labor Defense] with a multitude of front organizations, radical labor unions, the radical press, paid publicists, and volunteer agitators, joined in an exploitation of this ordinary murder trial for revolutionary purposes and propaganda, mass agitation, and the breaking down of the American judicial system and American institutions generally. That so many men and women of good will and supposed intelligence, not all of them eggheads or sentimentalists, should have joined in this shameful exploitation is a measure of the success of the techniques which have set a pattern of exploitation for cases of the same kind which were to follow.

Montgomery, *supra* n. 63, at 347.

162. For some union workers, Joe Hill was a martyr that symbolized American injustices. Ryan, *supra* n. 76, at 78 (quoting Hill's last words, "Don't waste any time in mourning—organize."). The Rosenbergs' case came at the height of the anti-Communist hysteria in the U.S. *Id.* at 228.

163. See *Joe Hill's Story: One Big Union*, http://www.kued.org/joehill/story/biography/big_union.html (accessed Jan. 25, 2007).

164. Death Penalty Info. Ctr., *Executions in the U.S. in 1992*, <http://www.deathpenaltyinfo.org/article.php?scid=8&did=468> (accessed Jan. 25, 2007).

165. Death Penalty Info. Ctr., *Executions in the U.S. in 1995*, <http://www.deathpenaltyinfo.org/article.php?scid=8&did=471> (accessed Jan. 25, 2007).

166. E.g. Irene Merker Rosenberg & Yale L. Rosenberg, *Lone Star Liberal Musings on "Eye for Eye" and the Death Penalty*, 1998 Utah L. Rev. 505, 505 n. 6 (citing David R. Dow, *Tucker's Execution Begs Revamping of Texas System*, Houston Chronicle A23 (Feb. 4, 1998)). Further, the victim in Tucker's case was also white. Death Penalty Info. Ctr., *Executions in the U.S. in 1998*, <http://www.deathpenaltyinfo.org/article.php?scid=8&did=474> (accessed Jan. 25, 2007).

media attention on the executions of white defendants like Gary Gilmore, Ted Bundy, John Wayne Gacy, Timothy McVeigh, and Caryl Chessman.¹⁶⁷ Meanwhile, few probably remember Wilbert Evans.¹⁶⁸

If you asked the average person to name someone who was executed in the United States, the names most likely to come up will be white defendants who killed white victims.¹⁶⁹ Of course, there are several factors that contribute to why certain cases get attention, such as the type of crime. A killer clown like John Wayne Gacy gets attention. Also, although he has not been executed, Mumia Abu Jamal, a black man on Pennsylvania's death row, has received significant media attention as his case has become a movement by itself.¹⁷⁰ However, unfortunately, race is likely a factor in determining media attention, just as the race of the victim and the defendant have been found to be factors in determining who receives the death penalty.¹⁷¹

Fifth, the timing of the support for innocence is relevant to the amount of attention given to wrongful execution cases. If one considers the recent potential wrongful executions, each of the cases received some significant media attention. Joseph O'Dell and Dobie Williams are the subjects of a book by a best-selling author.¹⁷² Carlos de Luna and Ruben Cantu have been the subject of a series of articles in major

167. These defendants even had movies made about them. *E.g.* *Cell 2455 Death Row* (Columbia Pictures 1955) (motion picture) (story of Caryl Chessman); *Executioner's Song* (Anchor Bay Entertainment 1982) (motion picture) (story of Gary Gilmore); *Gacy* (Lion's Gate 2002) (motion picture) (story of John Wayne Gacy); *Kill Me If you Can* (Columbia Pictures 1977) (motion picture) (story of Caryl Chessman); *Ted Bundy* (First Look Pictures 2000) (motion picture) (story of Ted Bundy).

168. Evans was a black man who was executed in Virginia based upon the aggravating factor of "future dangerousness" even though he saved the lives of guards and others while he was on death row. *See* Jeffrey L. Kirchmeier, *Aggravating and Mitigating Factors*, 6 Wm. & Mary Bill Rights J. 345, 372-74 (1998); Stuart Taylor, Jr., *We Will Kill You Anyway*, Am. Law. 54 (Dec. 1990).

169. One black man who did get national and international attention at the time of his execution was Gary Graham, who was executed in Texas on June 22, 2000. Frank Bruni, *With Bush Assent, Inmate is Executed*, N.Y. Times A1 (June 23, 2000). Graham was convicted only on the basis of one eyewitness, and his supporters made arguments regarding his innocence. Haines, *supra* n. 20, at 90. Before he was executed, organizations and supporters, including several celebrities, worked to publicize his case in Texas and across the nation. *Id.* at 90-91. However, perhaps the reason for the unique media attention on a black death row inmate had less to do with Mr. Graham and more to do with who was the governor. At the time of Graham's execution, the governor of Texas, George W. Bush, was prominent as the presumptive Republican presidential nominee. Bruni, *supra* n. 166. Graham was the one hundred and thirty-fifth person executed in Texas since Bush had become governor. *Id.* Another case involving a person of color that garnered significant media attention is the case of Stanley Tookie Williams, a defendant who was executed in December 2005. His case received attention because he was a former Crips gang leader who reformed. *See* Josh Kleinbaum, *Governor Denies Clemency for Tookie Williams*, Daily News L.A. N1 (Dec. 13, 2005).

Of the other people who were executed in recent years who have strong claims of innocence, Ruben Cantu and Carlos de Luna were Latino, Dobie Williams and Larry Griffin were black, and Joseph O'Dell and Cameron Willingham were white. *See* Death Penalty Info. Ctr., *Searchable Database of Executions*, <http://www.deathpenaltyinfo.org/executions.php> (accessed Jan. 25, 2007).

170. *See e.g.* *Big Break for Defense in Mumia Abu-Jamal Case*, Industrial Worker 1 (Jan. 1, 2006); *Mumia, Dearest, Cont.*, Weekly Standard 3 (May 29, 2006); Lloylita Prout, *Local FOP Protests Naming of Street after Mumia Abu-Jamal in France*, Philadelphia Inquirer, http://www.findarticles.com/p/articles/mi_kmtpi/is_200607/ai_n16567776 (July 14, 2006).

171. *See generally* Amnesty Intl., *Death by Discrimination—The Continuing Role of Race in Capital Cases*, <http://web.amnesty.org/library/index/engamr510462003> (accessed Jan. 25, 2007); Richard C. Dieter, *The Death Penalty in Black and White: Who Lives, Who Dies, Who Decides*, <http://www.deathpenaltyinfo.org/article.php?scid=45&did=539> (accessed Jan. 25, 2007); Raymond Paternoster et al., *An Empirical Analysis of Maryland's Death Sentencing System with Respect to the Influence of Race and Legal Jurisdiction*, <http://www.newsdesk.umd.edu/pdf/finalrep.pdf> (accessed Jan. 25, 2007).

172. *See supra* Section IIC.

newspapers.¹⁷³ Larry Griffin and Todd Willingham have had their cases examined in recent studies.¹⁷⁴ Yet, none of these names are household words, and they still have not received the national attention that Roger Coleman's case received. What many of these cases have in common is that these reports and coverage occurred mainly after the inmates were executed. Part of the reason for this disparity is that much of the attention on Coleman's case was generated while he was still alive and could appear before the camera, while many of these new innocence claims have found traction after there is no longer a living inmate to promote the claims. Further, Coleman was articulate and gave good interviews on television about his innocence.¹⁷⁵ Cases with a strong innocence claim prior to execution—even where the defendants were ultimately generally thought to be guilty like the Rosenbergs and Coleman cases—will be remembered as “innocence cases” longer than more likely actual post-execution innocence cases like Larry Griffin.

This lesson about the timing of the innocence claims is an important lesson for those working against the death penalty. In order to get significant attention on an innocence case, a substantial amount of the work needs to be done while the inmate is still alive. People are more likely to be upset about the impending execution of an innocent person than about a past execution of an innocent person. But once they are concerned about the potentially innocent person prior to execution, the concern will continue after the execution takes place.

Finally, cases like Coleman's where innocence or guilt can conclusively be established are more likely to get substantial media attention than cases with less conclusive evidence of innocence. Larry Griffin's case, thus far, has not captured the attention of the media. Perhaps with more evidence that absolutely proves his innocence, his case will get more attention. However, his execution was based upon eyewitness identification. Although eyewitness identifications are notoriously unreliable, it is also difficult to absolutely refute an eyewitness unless there was a video recording of the event.

Ruben Cantu's case has gained recent notoriety, at least in Texas. The difficulty with his case is that, like Griffin, he was executed on eyewitness testimony, now refuted, but there is no physical evidence for DNA testing that could conclusively prove his innocence.¹⁷⁶ Coleman's case was a rare case of someone with questionable guilt who was executed with evidence that could undergo DNA testing before DNA testing was developed. Thus, his case offered a unique opportunity to prove that someone who was innocent was executed. There may not be many cases that have the timing and the evidence to allow for such conclusive proof post-execution.¹⁷⁷

Another difficulty in Griffin's case is that even with more evidence it may not be possible to conclusively convince death penalty supporters of his innocence. In addition

173. *Id.*

174. See *supra* Sections IIB and IIC.

175. Frankel, *supra* n. 24, at 22.

176. Olsen, *supra* n. 151.

177. Post-conviction pre-execution DNA tests also proved the guilt of Rick McGinn and Derek Barnabei. *Marsh*, 126 S. Ct. at 2534 (2006) (Scalia, J., concurring) (citing Joshua K. Marquis, *Truth and Consequences: The Penalty of Death*, in *Debating the Death Penalty*, 117, 128–29 (Hugo Adam Bedau & Paul G. Cassell eds., Oxford U. Press 2004)).

to the lack of DNA evidence, the general public may be skeptical of his claims because Griffin was not a saint, and in fact he had pleaded guilty to another killing.¹⁷⁸ Thus, people may feel less outrage that he was executed for a murder that he did not commit. Another problem may be that although the evidence does not point toward Larry Griffin in this case, it does point toward his nephew, which might lead some people to presume that Larry Griffin must have had some involvement in the murder.¹⁷⁹ Thus, even if Griffin is absolutely innocent of this crime, it will be difficult to convince many of his innocence.

V. TWO PROBLEMS WITH THE ATTEMPT TO PROVE A WRONGFUL EXECUTION

There are two main problems in the abolitionist quest to prove an executed inmate was innocent. The first problem is that because the quest can take resources away from other potential strategies against the death penalty, abolitionists must consider whether the pursuit is worth the effort. The second problem for abolitionists is that it is difficult to conclusively establish that an innocent person was executed.

A. *Will Proof of the Execution of an Innocent Inmate Make a Difference?*

Regarding the first problem, the Coleman and Griffin cases raise the question about why there is a quest to find an executed innocent inmate during the modern death penalty era. Not everyone agrees that an innocence focus is the best way to attack the death penalty.¹⁸⁰ Already more than one hundred innocent people have been discovered on death rows across the country, raising the question of what difference will it make to show that one innocent person was executed. This question is important because, as some have noted, when death penalty abolitionists focus on innocence issues, they fail to educate people about other problems with the death penalty.¹⁸¹ Additionally, an overwhelming focus on innocence carries with it the implication that death penalty opponents believe it is acceptable to execute the guilty.¹⁸²

The quest for an executed innocent inmate is most likely driven by the fact that death penalty supporters regularly respond to the discovery of innocent people on death row with a statement like: "So what? The system worked and we found out they were innocent before they were executed. No innocent person in modern times has been executed."¹⁸³ For example, in the recent Supreme Court case of *Kansas v. Marsh*, Justice Scalia ridiculed Justice Souter's reference to studies about wrongful death

178. Herbert, *supra* n. 28.

179. Gross & Thompson, *supra* n. 29. Further, because Moss was suspected of killing Larry Griffin's brother, it might be harder for the general public to believe that Larry Griffin was not involved with his nephew killing Moss. *Id.*

180. See Steiker & Steiker, *supra* n. 16, at 623. Although Steiker and Steiker's article focuses on innocence in capital cases in general, not just on wrongful executions, they conclude, "We accordingly urge caution in looking to the argument from innocence as necessarily the strongest, either normatively or strategically, in seeking reform or abolition of the death penalty." *Id.*

181. *Id.* ("If innocence is cast as the central problem in capital punishment, then avoiding execution of innocents becomes the sought-after solution, deflecting the doubts and hesitations that abolitionists need to nurture about the limits of what extreme sanctions should be visited on the guilty.").

182. Further, it is possible that as DNA evidence is used more and more in trials, the number of postconviction innocence defendants with a real argument of innocence will dwindle.

183. *Marsh*, 126 S. Ct. at 2536 (Scalia, J., concurring).

sentences by noting that Justice Souter was unable to identify “any particular case or cases of mistaken execution.”¹⁸⁴ Justice Scalia then noted that Justice Souter’s reference to exonerated death row inmates “demonstrates not the failure of the system but its success.”¹⁸⁵ Without the discovery of an innocent executed person, Justice Scalia can say that “with regard to the punishment of death in the current American system, [the possibility that someone will be punished mistakenly] has been reduced to an insignificant minimum.”¹⁸⁶ Thus, the anti-death penalty advocates are driven to find a case to counter that argument along the lines of, “Oh yeah, we have Roger Coleman . . . er . . . Larry Griffin.”¹⁸⁷

Thus, the quest for an innocent executed inmate is the search for a rejoinder to the “So what?” of death penalty advocates in response to the discovery of innocent people on death row. The problem is that once an innocent executed person is found, most death penalty advocates will have another “So what?” waiting in response, such as “Well, that was ten years ago and the system works better now” or “That’s how things work in that state but not in our state.”¹⁸⁸ So, unless the executed innocent inmate is found to have been executed within a few years in the jurisdiction at issue, death penalty advocates will likely debate the significance of the discovery, just as they now debate the discovery of innocent people on death row.

Further, even if there were conclusive proof of an executed innocent person, death penalty supporters might maintain that the risk is a small one that society will tolerate.¹⁸⁹ Thus, the discussion about wrongful executions is not really about the execution of the innocent but about whether one thinks the death penalty is morally required or morally repugnant. Instead, the debate should center on those issues instead of on the issue of the rare executed innocent person. The problem, then, is that the people who still support the death penalty in light of the discovery of innocent people on death row may not be swayed by the discovery of an executed inmate.

Considering the difficulty in establishing innocence, sometimes non-innocence cases give a more concrete example of problems with the death penalty. For example,

184. *Id.* at 2534.

185. *Id.* at 2536. The argument that death row exonerations prove that the system works is another common argument made by death penalty supporters. *E.g.* Richard A. Rosen, *Innocence and Death*, 82 N.C. L. Rev. 61, 88 (2003) (citing Dudley Sharp, *Death Penalty and Sentencing Information in the United States*, <http://www.prodeathpnalty.com/DP.html> (accessed Jan. 25, 2007)).

186. *Marsh*, 126 S. Ct. at 2539. Similarly, Paul Cassell, who is now a federal district court judge, has claimed that abolitionists use the wrongful execution argument so much that the belief that an innocent person has been executed “has become something of an urban legend.” Smith, *supra* n. 8, at 1217–18 (quoting Paul G. Cassell, *In Defense of the Death Penalty*, in *Debating the Death Penalty*, *supra* n. 177, at 183, 205–06.

187. Even once an executed person is found to be innocent, death penalty supporters will likely claim that one mistake is still an insignificant error considering the large number of murder convictions. *See e.g. Marsh*, 126 S. Ct. at 2538–39.

188. *Id.* at 2534 (Scalia, J., concurring) (arguing that the Bedau-Radelet study about executed innocents was immediately obsolete because it relied upon old executions).

189. Senator Jeremiah Denton of Alabama argued that “saying that we should not have the death penalty because we may accidently [sic] execute an innocent man is like saying that we should not have automobiles because some innocent people might be accidentally killed in them.” Banner, *supra* n. 55, at 304. *See The Risk of Wrongful Execution of Innocents*, <http://www.wesleylowe.com/cp.html#risk> (accessed Jan. 25, 2007); Rosen, *supra* n. 185, at 104 (“According to this mindset, the execution of innocent people is, . . . [a]t best . . . a cost outweighed by the societal benefits from retribution and deterrence that we get from capital punishment.”).

within a few years of Coleman's execution, Wilbert Lee Evans was also executed in Virginia.¹⁹⁰ Unlike Coleman and Joseph Giarratano, another Virginia death row inmate around the same time who had an argument of innocence,¹⁹¹ Wilbert Evans did not argue he was innocent. Yet Wilbert Evans' case, perhaps more than the innocence cases, illustrates a problem with the death penalty that can never be fixed. In determining whether another human should live or die, one human does not really know what is in the soul of another.

Evans was convicted of the shooting death of a deputy sheriff, and he was sentenced to death based upon the aggravating factor that he was a "future danger."¹⁹² However, a few months after he was sentenced, six other Virginia death row inmates attempted to escape from prison.¹⁹³ The inmates took twelve prison guards and two female nurses as hostages.¹⁹⁴ During the uprising, Evans saved the lives of several hostages and prevented the rape of one of the nurses.¹⁹⁵ The Supreme Court held that these post-sentencing actions should not be considered in a challenge to the finding of "future dangerousness," and Evans was executed.¹⁹⁶

Unlike the innocence cases, there is no debate about Evans' actions. Despite his horrible crime, he was capable of heroics, but the death penalty rendered him a disposable human being. However, while his case sparked some outrage, little has been written about his case in comparison to the case of Roger Coleman and his claims of innocence.¹⁹⁷

Despite the problems with a focus on innocence issues, for some, the discovery of an executed innocent will make a difference.¹⁹⁸ The discovery of innocent people on death row in recent years is one of the reasons there has been a decline in support for and use of the death penalty.¹⁹⁹ Because both sides of the death penalty debate seek as many supporters as possible, then, the importance of the quest of an executed innocent will

190. Evans was executed in Virginia's electric chair on October 17, 1990. Taylor, *supra* n. 168, at 55–56.

191. In February 1991, Virginia's Governor removed Giarratano from death row because of questions about Giarratano's guilt though the inmate remains in prison today. Colman McCarthy, *A Governor's Doubt of a Man's Guilt Isn't Enough in Virginia*, National Catholic Rptr. 25 (Sept. 15, 2000).

192. Taylor, *supra* n. 168, at 54, 60–61; *see also* Kirchmeier, *supra* n. 168, at 372.

193. *Evans v. Muncy*, 498 U.S. 927, 927 (1990) (Marshall, J., dissenting).

194. *Id.* at 928.

195. *Id.*

196. *Id.* at 930; Taylor, *supra* n. 168, at 55–56. Some of the lessons of this article are highlighted by the Evans case. Political pressures helped deter the Virginia governor from granting clemency to Evans because the governor anticipated granting clemency to another condemned inmate, Joseph Giarratano. Joe Jackson & William F. Burke, Jr., *Dead Run* 196 (Crown 1999). The governor did ultimately grant clemency to Giarratano, a white inmate who, unlike Evans, had a claim of innocence and a substantial base of supporters. *See id.*; David A. Kaplan & Bob Cohn, *Pardon Me, Governor Wilder*, Newsweek 56 (Mar. 4, 1991); Pamela Overstreet, *Attorney General Refuses New Trial for Giarratano*, United Press Intl. (Feb. 20, 1991).

197. A LEXIS search of the terms "(wilbert /2 evans) and "death penalty")" in the NEWS Library and the ALLNWS File on February 6, 2007, found sixty-seven stories. Many of these stories do not mention Evans' actions during the prison uprising and instead mention his name because during Evans' execution in Virginia's electric chair blood spurted from his eyes and nose. *E.g.* Candace Rondeaux, *Va. Is Set to Electrocute a Killer*, Wash. Post B05 (July 20, 2006). A LEXIS search of the terms "(wilbert /2 evans) and "death penalty" and (prison /10 (escape or uprising))" in the NEWS Library and the ALLNWS File on February 6, 2007, found only ten stories.

198. Some scholars do expect such a discovery would have a great impact. Liebman, *supra* n. 142, at 553–54 (2002) ("The power of a message conveyed by a provably erroneous modern execution is, well, unknown and inscrutable, but probably great.").

199. Kirchmeier, *supra* n. 10, at 39–43.

remain important, though not definitive. In England, the execution of innocents played a role in the country abolishing the death penalty, and the names of Sacco and Vanzetti still ring across Massachusetts every time that state reconsiders whether to bring back the death penalty.

B. Is it Possible to Conclusively Prove Innocence of an Executed Inmate?

Regarding the second problem, the abolitionists face a difficult task in trying to establish the innocence of an executed inmate. For innocence to have the greatest impact, it must be conclusively proven because many convicted criminals claim innocence, leading the general public to be skeptical of such claims. The Griffin case illustrates the difficulty in establishing conclusively that an innocent person has been executed. For example, one death penalty supporter discounted the fact that the possibly innocent Griffin was executed by saying that “innocence is very different than saying this guy maybe didn’t do it.”²⁰⁰

Proving the innocence of an executed person is even more difficult than proving a living defendant is innocent, which is itself quite difficult.²⁰¹ There are a number of reasons it is more difficult to find that an executed person is innocent than it is to find that a living death row inmate is innocent. First, attorneys are appointed to represent living death row inmates, while courts do not provide resources for dead inmates. Second, while many capital defense attorneys would agree that the discovery of an executed innocent inmate would do great damage to the system of capital punishment, the attorneys have limited time and resources that are better spent on saving the life of someone rather than seeking tardy justice for the dead. Third, it is more difficult to prove innocence as time passes. Conclusive proof is difficult enough when the inmate is alive, but as time passes, it becomes more difficult to find reliable witnesses and evidence.

Even if evidence indicates someone probably did not commit a crime, most skeptics will not accept the conclusion without conclusive proof. For example, advocates of the death penalty raise questions about many of the people who have been exonerated from death row, claiming that they are in fact guilty.²⁰² Although our legal system uses juries to determine whether someone is guilty beyond a reasonable doubt, there is no definitive jury to determine whether someone is innocent beyond a reasonable doubt.²⁰³ Thus, today commentators still debate cases like those of Sacco and Vanzetti,

200. Zernike, *supra* n. 141 (quoting Joshua Marquis).

201. “Prisoners who want to prove their innocence through DNA tests must run [a] gauntlet of state and federal time limits to get access to evidence and to a day in court.” Barry Scheck et al., *supra* n. 52, at 283; see e.g. *House v. Bell*, 126 S. Ct. 2064 (2006) (discussing some of the procedural hurdles for innocence claims in habeas corpus proceedings). Another difficulty is that a defense attorney’s goal in representing a client on death row is to persuade judges and fact-finders that the client is not guilty beyond a reasonable doubt and to get the best deal for the client. Although a conclusive case of innocence would be welcomed by most attorneys, they will generally settle for a plea deal that best serves the client by getting the client off of death row and released from prison.

202. See e.g. *Marsh*, 126 S. Ct. at 2535–39 (2006) (Scalia, J., concurring). “[M]ischaracterization of reversible error as actual innocence is endemic in abolitionist rhetoric, and other prominent catalogues of ‘innocence’ in the death-penalty context suffer from the same defect.” *Id.* at 2537.

203. Because the debate centers on actual innocence, the standard for proving innocence is more likely

Joe Hill, Mary Surratt, and Bruno Hauptmann.²⁰⁴

The Coleman case was unique because there were resources available from supporters to continue investigating the case after Coleman was executed. Another way that the Coleman case was unique was that there was DNA evidence available to conclusively establish guilt or innocence. DNA evidence is only available in a small number of cases.²⁰⁵ Thus, because of the resources and because of the availability of DNA evidence, Coleman's case was a rare chance to establish innocence of an executed inmate.

An indication of the difficulty in establishing innocence of an executed inmate is that there are a limited number of pre-1976 innocence cases. The book *In Spite of Innocence* makes the case for a number of executed innocents, but few of those have captured much of the public's attention.²⁰⁶ Part of the reason for the lack of attention may be that the cases happened awhile ago, but it also might be the type of evidence of innocence. Many of the cases are like Larry Griffin's case, where the evidence of guilt is seriously questioned but there is no DNA evidence to conclusively prove innocence in a way that would satisfy pro-death penalty skeptics. Today, even the few pre-1976 possible innocence cases that stick out in the public consciousness, like the Sacco and Vanzetti case, are subject to debate about innocence versus guilt.

Despite these problems, the Coleman and Griffin cases do offer some hope for those who desire to prove the innocence of some of the inmates executed during the modern era. Some cases like Coleman's case will have DNA evidence. Both cases also show that sometimes people and resources do continue to stay focused on a case where an executed inmate's guilt is in question. So, despite the fact that the Coleman case was a defeat for death penalty opponents, it also offers some hope to continue the quest. And, despite the fact that Griffin's case may not have any conclusive DNA evidence, the case is still getting some attention, as are the cases of Joseph O'Dell, Dobie Williams, Cameron Todd Willingham, Carlos de Luna, and Ruben Cantu.

VI. SUMMARY: LESSONS FOR THE DEATH PENALTY ABOLITION MOVEMENT

As discussed above, the strategy of some death penalty opponents to focus on wrongful execution cases has some innate challenges. Because of the two problems discussed above and because of the lessons from history, death penalty abolitionists should re-evaluate the strategies for finding a wrongful execution.

While we now know that it is most likely that Roger Coleman was guilty, his case still illustrates how errors in the legal system occur. DNA evidence may have shown the guilt of one man, but it did not confirm the guilt of everyone who has been executed in

something higher than beyond a reasonable doubt.

204. See *supra* Section IA.

205. See Adam Liptak, *The Nation: You Think DNA Evidence is Foolproof? Try Again?* N.Y. Times 45 (Mar. 16, 2003) ("[Peter] Neufeld estimated that biological evidence that can be subjected to DNA testing to identify the guilty is available in fewer than 10 percent of violent crimes."); Adam Liptak, *Prosecutors See Limits to Doubt in Capital Cases*, N.Y. Times A1 (Feb. 24, 2003) ("DNA evidence . . . is available in a fairly small percentage of cases . . . and can provide conclusive evidence in even fewer."); David Rose, *State Should Protect Mentally Retarded from Execution*, Morning Call (Allentown, PA) A15 (July 14, 2005) ("DNA evidence from the perpetrator is only available in approximately 15 percent of murder cases.").

206. See generally Radelet et al., *supra* n. 6.

modern times. As a result, death penalty opponents will turn their attention away from Roger Coleman and toward getting attention for other potentially executed innocents like Larry Griffin, Carlos de Luna, and Ruben Cantu.

As discussed in Section Three, history provides examples of why some alleged wrongful execution cases get more attention than others. Common lessons for getting significant attention on a wrongful execution include: (1) the cases with the most attention were ones that developed strong innocence arguments while the defendants were alive; (2) a case with conclusive proof of innocence will provide a more persuasive argument against the death penalty than a case without such proof; (3) cases that are linked to political agendas begin with a pre-existing foundation of support; (4) defendants with supporters with substantial resources can get more attention than cases without resources; and (5) cases with famous victims or defendants are more likely to get attention than cases with unknowns. Additionally, the race of the defendant and victim may affect the attention that innocence claims receive, so death penalty abolitionists need to address racism in society when advocating on behalf of condemned persons of color.²⁰⁷

An important lesson from the innocence cases is that for innocence to have a large impact, it must have been a major issue while the inmate was alive. Perhaps people are more interested when they see the person alive, and that interest lingers after the execution. This lesson indicates that the abolitionist's best use of resources over the long term is to focus on cases where the inmate is still alive. The strongest support for abolishing the death penalty will develop if, first, a large number of people believe a person is innocent before the execution, and then, second, after execution there is conclusive proof that the person was innocent. By contrast, if a relatively anonymous inmate is executed and later thought to be innocent without conclusive proof, that discovery will not have a significant impact on death penalty support.

Another lesson from the prior cases is that claims of innocence resonate in society more if the defendant is connected to a political agenda, as in the case of Sacco and Vanzetti, or has strong advocates like the ones that supported Coleman. Certainly, there are still people who will continue to advocate for those who they believe are innocent, but the innocent have to be lucky enough to find people like Jim McCloskey, who spent so much of his energy advocating for Coleman.²⁰⁸

207. The lessons about race do not mean that abolitionists should focus on cases of white defendants; rather, they should be aware of the inherent racism they may face as they develop compelling arguments on behalf of executed defendants of color. As discussed earlier, at least in the non-execution context, there are examples of those like Mumia Abu-Jamal and the Scottsboro defendants who have had significant movements supporting their innocence. See *infra* nn. 163–64; Dan T. Carter, *Scottsboro: A Tragedy of the American South* 137–73 (Louisiana State U. Press 1979). The cases involving those defendants are good examples of how mass movements have been tied to cases, and they should be studied by activists today. As Haywood Burns noted, “The Scottsboro Case is an important study in the role of mass movements operating in tandem with courtroom legal defenses to secure justice for the wrongly accused or convicted.” Kwando Mbiassi Kinshasa, *The Man from Scottsboro: Clarence Norris in His Own Words* 1 (McFarland & Co. 1997) (Foreword).

208. After the DNA tests revealed Coleman's guilt, McCloskey removed reminders of Coleman from his office and from his organization's website. Frankel, *supra* n. 24, at 24. His organization is currently working to exonerate twenty-four other inmates. *Id.* Marie Deans' organization, which also advocated for Coleman, was forced to close in 1993 after a decline in funds following a libel lawsuit against her and the lawyers on the case by a man who the defense team accused of killing Ms. McCoy. See *id.*

After considering the strategy for how wrongful conviction cases get attention, abolitionists should consider how many resources should be allotted to innocence arguments and whether it will ever be possible to conclusively prove an executed inmate was innocent. There is some benefit to the innocence arguments and the expenditure of resources on this issue. In recent years, concerns about executing the innocent have had an impact not only on support for the death penalty in general but also on the likelihood that jurors will impose the death penalty.²⁰⁹ Conclusive proof of a wrongful execution will have even more of an impact on jurors as well as legislators and judges. But such conclusive proof is difficult to come by. After a person is executed, there are less incentives, fewer resources, and more faded memories than when the active case was in the legal system.

Finally, abolitionists should remember that a segment of society is willing to tolerate the risk of executing innocent persons and probably willing to tolerate the rare execution of innocent people in exchange for benefits from the death penalty.²¹⁰ New York State Senator Dale Volker, who worked for ten years to reinstate the death penalty in New York, considered the risk of executing the innocent and stated, "I would never think it's impossible. You would hope that it would never happen, but the mere fact that you might fail does not argue that you shouldn't do it."²¹¹

Therefore, the discovery of an executed innocent may not end capital punishment. The execution of Sacco and Vanzetti did not end the death penalty in this country, despite criminologist George Kirchwey's expectation at the time that the case "struck a death blow at capital punishment in America."²¹² Yet, as seen by the wrongful execution cases throughout history, such cases stir the debate on the death penalty. While innocence by itself should not be presented as the only—or most important—death penalty issue, it will continue to be an important sword for abolitionists in the battle against the death penalty.

VII. CONCLUSION

What I say is that I am innocent. . . . That I am not only innocent of these two crimes, but in all my life I have never stolen and I have never killed and I have never spilled blood. . . . Not only am I innocent of these two crimes, not only in all my life I have never stolen, never killed, never spilled blood, but I have struggled all my life, since I began to reason, to eliminate crime from the earth.

Everybody that knows these two arms knows very well that I did not need to go into the streets and kill a man or try to take money. I can live by my two hands and live well. But besides that, I can live even without work with my hands for other people. I have

209. See e.g. Diane Carroll, Tony Rizzo & Laura Bauer, *Death Penalty Fate is in Doubt*, Kansas City Star A1 (Dec. 4, 2005) (citing a veteran prosecutor who notes that publicity like that regarding Larry Griffin's innocence makes capital jurors less likely to vote for death).

210. Some argue that any deterrence value of the death penalty outweighs the risk of executing the innocent, which is a low risk. Liebman & Marshall, *supra* n. 30, at 1661 ("If one is to believe the polls, most Americans continue to support capital punishment, though a strong majority believes that innocent people have been executed. People thus may believe some risk of error is tolerable if the only alternative is abandoning the death penalty altogether."); Smith, *supra* n. 8, at 1229.

211. Radelet & Bedau, *supra* n. 47, at 325–46, 340.

212. Banner, *supra* n. 55, at 226 (speaking at an annual meeting of the League to Abolish Capital Punishment).

had plenty of chance to live independently and to live what the world conceives to be a higher life than to gain our bread with the sweat of our brow.

—Bartolomeo Vanzetti, in a speech before sentencing to Judge Webster Thayer on April 9, 1927.²¹³

In 1661, two brothers and their mother were hanged and gibbeted near Campden, England, for the murder of William Harrison.²¹⁴ However, a few years after the triple execution, the “victim” returned alive.²¹⁵ The discovery of the innocence of the three people executed did not end the use of the death penalty. Although the reappearance of Harrison made some question the death penalty, for others it had no impact on their faith in capital punishment. They assumed the executed mother was a witch who caused the events, which were “signs of Satan’s evil designs and of God’s overwhelming mercy.”²¹⁶

Despite the surprising lack of concern in the Harrison case, innocence is still an important part of the death penalty debate. More than three hundred years after the wrongful executions in the Harrison case, the innocence of executed inmates played a major role in the eventual abolition of the death penalty in Great Britain.²¹⁷

In addition to blaming wrongful executions on God and Satan, human beings have struggled to fix the human flaws and design a better capital punishment system. In the United States, during a time of growing concern about the risk of wrongful executions, the response has often been to try to fix the legal system instead of doing away with the death penalty.²¹⁸ Most recently, when Illinois discovered thirteen innocent men on death row, one of the responses was a study that suggested some changes to criminal procedure rules in the state.²¹⁹

In Illinois, though, the suggested procedural changes were not the only response. The governor imposed a moratorium on the death penalty and commuted the sentences of everyone on death row.²²⁰ Within the last few years, several other states have

213. *The Letters of Sacco and Vanzetti* 363 (Marion Denmon Frankfurter & Gardner Jackson eds., E.P. Dutton & Co. 1960).

214. Smith, *supra* n. 8, at 1190–92. In gibbeting, the bodies of executed persons were hanged in iron cages in a prominent location. See *id.* at 1192 n. 28.

215. See *id.* at 1192. Harrison claimed to have been attacked on the night of his disappearance and pressed to serve on a sailing ship. *Id.*

216. *Id.*

217. See Connery, *supra* n. 68, at 3 (noting the execution of three innocents—Timothy Evans, Derek Bentley and Mahood Matan—leading to the abolition of the death penalty in Great Britain); Cristoph, *supra* n. 30, at 174–175 (noting, “[I]t is doubtful that abolitionist feeling in the nation would have been strong enough to force reconsideration of the issue by Parliament in the mid-fifties had not” the executions of the innocent Derek Bentley and Timothy John Evans taken place).

218. Smith, *supra* n. 8, at 1198–1214. Interestingly, one criticism that prosecutors sometimes have about the death penalty is that concerns about executing the innocent result in procedural laws that may make it more difficult to convict guilty non-capital defendants. Recently, one former prosecutor noted that the abolition of the death penalty “will be good for the law as a whole—that in their efforts to avoid imposing death, courts have established procedural precedents that make it more difficult for prosecutors to get convictions in other criminal cases.” Halloran & Jack, *supra* n. 17, at 36–38.

219. *Id.* at 38.

220. Eric Ferkenhoff, *Jury in Ill. Returns Inmate to Death Row*, Boston Globe A2 (May 25, 2004). Similarly, recently Ohio Governor Ted Strickland noted that he has “serious questions” about the death penalty, and Tennessee Governor Phil Bredesen imposed a ninety-day moratorium on executions. Andrew Cohen, *Stay*

considered moratorium bills, and at least sixteen legislatures have considered bills to abolish the death penalty.²²¹ Like Illinois, New Jersey passed a moratorium bill.²²² After the New York Court of Appeals found New York's death penalty unconstitutional,²²³ the New York Assembly held a number of hearings and decided not to reinstate the death penalty.²²⁴

Despite the attraction of innocence, the real focus should be that the "innocence" cases show the infallibility of the capital punishment system as a whole. If innocent people are getting the death penalty, guilty people are being punished more severely than they deserve. If innocent people are not getting a fair trial, then injustices are taking place in all cases. The lessons of the Sacco and Vanzetti and Larry Griffin cases are the same lessons from the Roger Coleman and the Rosenbergs cases even if the former are innocent and the latter are guilty.²²⁵ Systemic injustices, biased media attention, attorney errors, hatred of outsiders, and human fallibility were problems in all of these cases, not just the genuine innocence cases. Although we use the term "wrongful execution" to mean the execution of the innocent, executions of the guilty that are unfair, arbitrary, biased, or based on unreliable aggravating evidence or incomplete mitigating evidence are also wrongful. Thus, the innocence cases should not be considered in isolation. They must be considered in the context of other problems in the capital punishment justice system along with the issue of whether the problems outweigh any benefits from having the death penalty.

We imagine that the sufferings of Sacco and Vanzetti were worse or more deserving of our sympathy if they were innocent than if they were guilty because we can relate to innocent people more than murderers. Even if that is all true, it is wise to recognize that the debate about the death penalty encompasses much more than innocence. The leaders in Illinois, New Jersey, and New York who stopped executions recognized that the innocence discoveries expose serious systemic problems. The end of executions in those states reflects an understanding that human beings have been making

of Executions: *After a Generation of Reckless Expansion, the Pendulum is Swinging Back*, L.A. Times A19 (Feb. 3, 2007).

221. Halloran & Jack, *supra* n. 17, at 38.

222. *Id.*

223. *People v. LaValle*, 817 N.E.2d 341 (N.Y. 2004).

224. See Sara Darehshori et al., *Empire State Injustice: Based upon a Decade of New Information, a Preliminary Evaluation of How New York's Death Penalty System Fails to Meet Standards for Accuracy and Fairness*, 4 Cardozo Pub. L., Policy & Ethics J. 85 (2006); Patrick D. Healy, *Death Penalty Is Blocked by Democrats*, N.Y. Times B1 (Apr. 13, 2005); Sam Roberts, *Switch by a Former Supporter Shows Evolution of Death Law*, N.Y. Times B1 (Feb. 28, 2005). See also *A Report on Five Public Hearings on the Death Penalty in New York Conducted by the Assembly Standing Committees on Codes, Judiciary and Correction, December 15, 2004–February 11, 2005*, <http://www.assembly.state.ny.us/comm/Codes/20050403/> (accessed Jan. 25, 2007). At the hearings, those opposed to the reinstatement of the death penalty testified about the risk of executing the innocent, while those in favor of the death penalty claimed that there is no proof that an innocent person has been executed. *Id.* at 9.

225. For example, in his dissenting opinion in *Coleman*, Justice Blackmun criticized the majority for failing to make "any mention of petitioner Coleman's right to a criminal proceeding free from constitutional defect or his interest in finding a forum for his constitutional challenge to his conviction and sentence of death." 501 U.S. at 758 (Blackmun, J., dissenting). The Coleman case may have had some impact on Justice Blackmun because in less than three years after *Coleman* was decided, he took the position that the death penalty was unconstitutional, citing Coleman's case in at least two points in the opinion where he announced his new position. *Callins v. Collins*, 510 U.S. 1127, 1130 (1994) (Blackmun, J., dissenting from denial of a petition for writ of certiorari).

reforms to avoid wrongful executions since at least the 1600s.²²⁶ Yet, after human beings have spent more than four hundred years of their existence trying to fix the procedures for legalized killings, we still make mistakes. After all, we are human.²²⁷

226. Smith, *supra* n. 8, at 1193–99. Wrongful executions in the 1600s “prompted leading English legal commentators to issue strong cautions about the dangers and limitations of so-called ‘presumptive’ (i.e., circumstantial) evidence and to insist that prosecutors be required to prove that a crime had indeed been committed before permitting a jury to decide on a capital defendant’s fate.” *Id.* at 1193.

227. “To err is human.” Alexander Pope, *An Essay on Criticism*, 19 (Kessinger Publg. 2004).

